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Supreme Court, U.S.
FILED
971361 FEB 1 9 1998
OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE BRONX HOUSEHOLD OF FAITH,
JACK ROBERTS AND ROBERT HALL,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
COMMUNITY SCHOOL DISTRICT NO. 10 AND
CHARLES WILLIAMS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Board of Education of the City of New York by policy permits community groups to rent its school facilities for "civic, social and recreational purposes" and "religious discussion," but prohibits "religious services and instruction." A small house church in the Bronx requested to meet in a nearby middle school for its weekly Sunday morning worship services. School officials denied the request because the content of the meetings would include religious services and instruction.

1. Whether the Second Circuit below erred in holding -- in conflict with recent decisions by the First, Third, Fourth, Fifth and Eighth Circuits -- that public school facilities open to community groups for social, civic and recreational purposes, including religious discussion, are not a public forum but instead a limited forum, from which the government may exclude groups on the grounds that the expression they wish to engage in is a religious service or instruction?

2. Whether the Board of Education's prohibition on religious services and religious instruction in its forum violates the Free Speech Clause, the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause?

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THE BRONX HOUSEHOLD OF FAITH,
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THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT NO. 10 and CHARLES WILLIAMS,

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OPINIONS BELOW

The panel decision of the Second Circuit is reported at 127 F.3d 207 and appears in the Appendix at 1a. The opinion of the U.S. District Court for the Southern District of New York is unreported and appears in the Appendix at 32a. The Second Circuit's order of November 24, 1997 denying the petition for rehearing and suggestion for hearing en banc is unreported and

appears in the Appendix at 46a.

JURISDICTION

The Second Circuit denied the petition for rehearing and suggestion for rehearing en banc on November 24, 1997. App. 46a. The panel decision of the Second Circuit was issued on September 15, 1997. This Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendments I and XIV are found in the Appendix at 48a. New York Education Law §414 is found in the Appendix at 48a. The facilities use policy for the Board of Education for the City of New York is found in the Appendix at 52a.

STATEMENT OF THE CASE

The Bronx Household of Faith ("the Church"), an evangelical Christian church which meets in a house, sought to rent a local middle school for its Sunday morning worship services from Community School District No. 10 ("the School District"), a local school district under the jurisdiction of the Board of Education of the City of New York. The School District denied the Church's request based on its policy prohibiting its buildings from being used for "religious services or instruction." The School District has allowed the Church to rent the middle school twice before for nonreligious events. The Church challenges the constitutionality of the prohibition.

The School District's Facility Use Policy

A state statute and a school district policy based on the

statute govern use of the public schools facilities by community groups for expressive activities. New York Education Law §414 permits nonschool community groups to use public school buildings for "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public."A state intermediate appellate court in New York ruled in 1978 that this New York state law prohibits meetings in schools for religious purposes. *Trietley v. Board of Ed. of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (App. Div. 1978). The Second Circuit and this Court have accepted *Trietley* as an authoritative interpretation of this state law. *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384, 386-87 (1993).

Public schools in New York City, including Community School District No. 10 in the Bronx, have opened their facilities to community groups according to a school district policy based on New York Education Law §414. Under its policy entitled, "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities," the Board of Education of the City of New York permits community groups to meet in school facilities for the following purposes (App. 52a):

> "For the purpose of instruction in any branch of education, learning or the arts." (5.6.1);
>
> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." (5.6.2);
>
> "...for holding political meetings where representatives of different viewpoints may be heard."(5.6.3);

> "For civic forums and community centers in accordance with applicable law." (5.6.4);
>
> "For such other uses as may be authorized by law." (5.6.6).

Another part of the policy states that the School District permits meetings by tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Policy 7.1 and 7.2; App.53a -54a.

Community groups can schedule weekly meetings with the School District for up to an entire year in advance. Community groups can renew these agreements with the School District for weekly meetings each year.

The School District's policy in section 5.9 prohibits community groups from engaging in religious services and instruction, but permits them to hold religious discussions. The School District relied on this part of the policy to refuse to rent its middle school facility on the weekend to the Church (App. 53a):

> No outside organization or group may be allowed to conduct **religious services or religious instruction** on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible. (Emphasis added).

Groups That Have Met in District 10 Schools

Many different groups and individuals met at the School District's facilities during the 1994-95 school year for meetings, lectures, concerts and other expressive activities (App. 6a-7a):

ACAP, Inc.
Alliance for Education
Boy Scouts
Bronx School of Music
Bronx YMCA
Bronx Youth Service
Crotona Coalition
Edgemont Day Care
Girl Scouts
Grace Lutheran Church
Greek Orthodox Community of Riverdale
Kingsbridge Heights
Mosholu Community
Mount Hope Housing
Pius XII Beacon
RDK West Camps
Riverdale Community Center
South Fordham
West African Association

The parties stipulated that the School District has always refused to allow religious worship or religious instruction in its school buildings. There has been no prior religious use of the schools in the past in Community School District No. 10. App. 7a-8a.

Churches have met in School District buildings, but none have used them for the prohibited purposes of religious worship

or instruction. For example, the petitioner Church in this case has twice rented the school building at issue for nonreligious events (a banquet and a sports and games night). The respondent School District has never contended that the respondent Church is ineligible to meet for any other reason other than the religious nature of the Church's intended use.

The Church Requests to Meet in the School for Worship

The Bronx Household of Faith is an evangelical Christian church that was formed in 1971 and has been meeting in the Bronx since that date. App.2a-3a. Robert Hall and Jack Roberts are the co-pastors of the Church. *Id.*

Because the Church is outgrowing the house where it has been meeting, Pastor Hall sought permission to meet in the gymnasium-auditorium of a nearby middle school. App.7a. On September 8, 1994, Pastor Robert Hall submitted letters to a variety of school officials seeking permission to rent M.S. 206B, Anne Cross Mersereau Middle School, on Sunday mornings for the Church's weekly worship service. *Id.* As noted, the Church had met in that school before for two nonreligious events. The worship service would consist of the singing of Christian hymns and songs, prayer, fellowship with other Church members and Biblical preaching. *Id.*

District 10 official Frank Pagliuca declined to rent the facility, saying that a religious worship service was a prohibited use under the School District's Policy 5.9. *Id.* Pastor Hall asked the superintendent for permission to meet for worship services, and was denied because of the same policy provision banning religious worship and instruction. *Id.*

The Church and its pastors then filed this lawsuit in state court in the Bronx under 42 U.S.C. §1983 and the New York

Declaratory Judgment Act, claiming a violation of their federal constitutional rights under the First Amendment to freedom of speech, free exercise of religion, rights under the Establishment Clause, rights under the Equal Protection Clause of the Fourteenth Amendment and rights under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq*. App. 3a. The School District then invoked its right to remove the case to federal district court. *Id.* The District Court upheld the School District's policy and its denial of the Church's request to meet in the school for worship services. *Id.*

The District Court's Opinion

On December 5, 1996, the U.S. District Court for the Southern District of New York issued an opinion granting the School District's motion for summary judgment and denying the Church's motion for summary judgment. App. 32a - 45a. The opinion found that the School District's policy and N.Y. Education Code §414 were constitutional under the First Amendment, and that they created a limited public forum for "non-exclusive" groups. App. 41a-43a.

The District Court ruled that a church worship service could never qualify under the policy as a group meeting for "social, civic ... and other uses pertaining to the welfare of the community." The District Court reasoned that religious groups could never be community groups under the policy because they are so different from secular community groups:

> [h]istorically and constitutionally in this country, however, religion cannot be lumped together with other social, civic and community welfare activities. From our earliest Pilgrim forefathers, it has been the tradition in this country for government and religion to remain

> separate. Establishment Clause, U.S. Constitution. Therefore, the assumption that broadly stated purposes such as "civic" and "community" must also encompass "religious" is unfounded.

District Court opinion, App. 41a-42a, n. 1.

The District Court denied the other claims raised by the Church and upheld the School District's policy. The Church appealed to the Second Circuit.

The Second Circuit's Opinion

The Second Circuit affirmed the District Court on a 2-1 vote, upholding the exclusion of religious expression both in the School District's policy and in New York Education Law §414. App. 1a. The Second Circuit essentially restated its earlier opinion from *Lamb's Chapel v. Center Moriches Union Free School District,* 959 F.2d 381 (2d Cir. 1992), which this Court unanimously reversed in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

The Second Circuit reaffirmed a ruling it had made three times earlier that the forum created in New York public schools by New York Education Law §414 allowing meetings for social, civic and recreational purposes is a limited forum, not a public forum. *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 680 (2d Cir. 1988); *Travis v. Owego-Apalachin School District,* 92 F.2d 688, 692 (2d Cir. 1991) and *Lamb's Chapel,* 959 F.2d at 387.

The Second Circuit rejected the Church's suggestion that this Court strongly indicated in *Lamb's Chapel* that the Second Circuit erred when it ruled that N.Y. Education Law §414 does

not create a public forum but a limited forum. This Court had said, "[t]he argument [that N.Y. Education Law creates an open forum] has considerable force, for the District's property is heavily used by a wide variety of private organizations ...," *Lamb's Chapel*, 508 U.S. at 391. The Second Circuit, however, relied on past state court precedents antedating *Lamb's Chapel* finding that the state law created a limited forum.

Because the School District had created only a limited forum, the Second Circuit reasoned that any exclusions were to be judged by a reasonableness standard. The Second Circuit noted that this Court had faulted the Second Circuit in *Lamb's Chapel* for "utter[ing] not a word in support of the reasonableness standard," *Lamb's Chapel*, 508 U.S. at 393 n.6. The Second Circuit then tried to correct this deficiency by supplying a number of reasons why the exclusion of religious expression is reasonable. The Second Circuit speculated that state legislators and school officials desired to avoid identification of public schools with religious worship services. App.14a-15a. Also, the Second Circuit found it reasonable "to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City." App. 15a.

The Second Circuit rejected the application of *Widmar v. Vincent*, 454 U.S. 263 (1981), because *Widmar* involved a university campus, not a public school. The Second Circuit explained that an open forum at a university campus is more "open" than an open forum at a public school. App. 11a-12a. Also, the Second Circuit rejected application of *Board of Education v. Mergens*, 496 U.S. 226 (1990), because *Mergens* involved a federal equal access statute for students and not the Free Speech Clause. App. 13a. The Second Circuit said there was no viewpoint discrimination as in *Lamb's Chapel* and *Rosenberger v. Rectors and Visitors of the University of*

Virginia, 115 S.Ct. 2510 (1995) by pointing out that the policy here does not allow a secular parallel to religious worship services to meet in the public schools. App. 14a. However, the Second Circuit stated that the policy did conform to *Lamb's Chapel* by permitting groups to meet for "discussing religious material or material which contains a religious viewpoint or for distributing such material." App. 16a.

The Second Circuit also rejected the Church's claims under the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause. The court ruled the policy and N.Y. Education Law §414 do not violate the Establishment Clause because the exclusion of religious worship and instruction from this "limited forum" was reasonable. App. 17a-18a.

The prohibitions on religious worship and instruction in the School District's policy and N.Y. Education Law §414 do not violate the Free Exercise Clause, the Second Circuit ruled, because they "do not bar any particular religious practice. They do not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to practice their religion, albeit in a location separate from M.S. 206B." App. 19a.

The Second Circuit also ruled that the policy and N.Y. Education Law §414 did not violate the Equal Protection Clause under such decisions as *Police Department v. Mosley*, 408 U.S. 92 (1972), because those decisions applied to traditional open forums, not the "limited forum" the Second Circuit found created in this case. App. 19a-20a.

Judge José A. Cabranes dissented in part from the majority's decision. He expressed some doubt about whether the Second Circuit had correctly upheld exclusion of religious expression

from public schools under N.Y. Education Law §414. However, Judge Cabranes stated that a panel of the Second Circuit could not overrule the decision of the other panels that had ruled that N.Y. Education Law §414 created a limited forum. App. 23a. Judge Cabranes pointed out that the earlier Second Circuit decisions finding that state law created only a "limited forum" were based on the pre-*Widmar* ruling by a New York intermediate appellate court, *Trietley v. Board of Education*, 409 N.Y.S.2d 912 (N.Y.App. Div. 1978). *Trietley* relied on a "now-outdated understanding of the Establishment Clause," Judge Cabranes wrote. App. 22a.

Judge Cabranes concluded that the School District engaged in unconstitutional viewpoint discrimination in violation of this Court's rulings in *Lamb's Chapel* and *Rosenberger*. He dissented from the panel's ruling upholding the policy's restriction on religious instruction from the forum. Judge Cabranes pointed out that the policy opened the schools "[f]or the purpose of instruction in any branch of education, learning or the arts" and concluded that to permit all instruction, but exclude religious instruction, is viewpoint discrimination. App. 24a-31a.

The Church filed a petition for rehearing and a suggestion for hearing en banc. The Second Circuit denied the petition and the suggestion on November 24, 1997. App. 46a-47a.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case and reverse the Second Circuit's aberrant interpretation of the First Amendment that allows New York state school districts to exclude religious services and instruction from facilities generally open to the public during nonschool hours. The Second Circuit makes an unconstitutional distinction between

religious worship and instruction, on the one hand, which a school district may ban from a public forum, and religious discussion, on the other hand, which it could not ban. This ruling collides with this Court's public forum cases such as *Widmar v. Vincent,* 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 392 (1993), and others. The exclusion of religious worship and instruction from the forum formed by the School District policy and New York Education Law §414 violates the Free Speech Clause, the Establishment Clause, the Free Exercise Clause and the Equal Protection Clause.

I.

THE SECOND CIRCUIT'S DECISION THAT A FORUM OPENED TO THE PUBLIC FOR SOCIAL, CIVIC AND RECREATIONAL PURPOSES IS ONLY A LIMITED FORUM THAT MAY EXCLUDE RELIGIOUS WORSHIP AND INSTRUCTION CONFLICTS WITH THE RULINGS OF THIS COURT AND THOSE OF THE FIRST, THIRD, FOURTH, FIFTH AND EIGHTH CIRCUITS

The Second Circuit held that a public school district may deny equal access to after-school use of its facilities for religious worship or instruction solely because of the religious content of the planned use. The Second Circuit also ruled that a forum opened for "civic, cultural and recreational activities" is not an open forum, but a limited forum. This ruling conflicts with at least five other federal appeals court decisions. Those circuit decisions addressed whether government officials could exclude religious expression from forums opened for expression very similar to the speech this policy permits in this case. Three of these circuit decisions involved public schools. This Court should grant review and reverse the Second

Circuit's conflicting ruling.

A. Other Circuits Have Held Unconstitutional Government Exclusion of Religious Worship or Instruction From Forums Opened by Policies Similar to This One.

The Board of Education of the City of New York, by policy and practice, allows nonschool groups to meet for "social, civic and recreational" purposes, and "for such other uses as may be authorized by law." Policy 5.6.2 and 5.6.6; App. 52a. The School District permits meetings by tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Policy 7.1 and 7.2; App. 53a-54a.

This Court and at least five other circuits have found that similar policies created public forums, and that therefore the Constitution required the government to justify exclusions of religious expression from these forums with a compelling state interest. However, with completely circular logic, the Second Circuit ruled that this forum is only a limited public forum, because it excludes religious services and instruction. The Second Circuit then reasoned that the exclusion of religious services and instruction is to be judged only by the reasonableness standard.[1] (The reasonableness standard is used

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[1] This Court uses a forum analysis in deciding claims of access to public property for expressive activities. *See, e.g., Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or non-public"). There are "three types of fora: the traditional public forum,

for a nonpublic forum, not a limited forum, which shows further confusion on the Second Circuit's part).

This case is very similar to *Widmar v. Vincent,* 454 U.S. 263 (1981) and *Widmar* should control the result here. This Court ruled in *Widmar* that the University of Missouri-Kansas City had created a public forum for students by policy, and that it violated the Free Speech Clause to prohibit a student worship service from meeting on campus. The policy at issue in *Widmar* permitted meetings for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), which is similar to the policy creating the forum in this case. This Court and the Eighth Circuit ruled the University of Missouri had created a public forum with an unconstitutional content-based exclusion of religious worship.

In addition to the Eighth Circuit's decision in *Chess v. Widmar,* the Second Circuit's decision conflicts with the decisions of four other circuits on whether such access policies

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the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property traditionally open to assembly and debate, such as public streets and parks. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] ... for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups. *Widmar v. Vincent*, 454 U.S. 263 (1981) and school board meetings opened for citizen input, *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966). The Second Circuit's concept of a "limited forum" improperly confuses a designated public forum with a nonpublic forum.

create open forums and whether the religious exclusions are constitutional. In each of these cases, the federal circuit courts ruled that the government must permit religious worship or instruction in school facilities (and a public library) because the government had opened the facilities for community use. In contrast, the New York City school board policy upheld by the Second Circuit would have barred access for each of the religious uses that the other circuits ruled the Constitution requires.

The First Circuit ruled in *Grace Bible Fellowship v. Maine School Administrative District No. 5,* 941 F.2d 45 (1st Cir. 1991), that a Maine school district had created a public forum when it opened its buildings for meetings by youth groups, community, civic and service organizations, government agencies, educational programs, and cultural events.[2] A school district in Maine rejected a local church's request to rent the high school for an evangelistic outreach that would have included a free Christmas meal and preaching on the true meaning of Christmas because of the event's religious preaching and prayer. The First Circuit ruled that the school district violated the church's First Amendment rights with its policy prohibiting community groups from leasing school facilities "for the direct advancement of religion," calling the school district's actions "censorship," 941 F.2d at 48, and an "elementary violation" of the First Amendment. *Id.* This evangelistic Christmas dinner probably would have been denied access to New York City school facilities under the Second Circuit's opinion.

The Third Circuit ruled in *Gregoire v. Centennial School*

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[2] The text of the Maine school district's policy does not appear in the First Circuit's opinion, but it was in the record before that Court and is taken from the Brief of Appellees, pps 9-10.

District, 907 F.2d 1366 (3rd Cir. 1990), that a suburban Philadelphia school district had created a public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions. 907 F.2d at 1372-73, 1378-79. The Third Circuit ruled that the school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by Andre Kole, an evangelist who performs an illusionist show as a vehicle to preach a Christian gospel message to the audience. The Third Circuit declared unconstitutional a policy which prohibited community groups from using school facilities "for religious services, instruction and/or religious activities." This evangelistic illusionist event probably would not have been permitted to meet in New York City school facilities under the Second Circuit's ruling.

The Fourth Circuit ruled in *Fairfax Covenant Church v. Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994), that a school district had created a public forum by its policy permitting meetings by cultural, civic and educational groups, as well as political organizations. The Fourth Circuit declared unconstitutional the school district's policy that required churches to pay more than nonreligious groups to rent school buildings. The worship services granted equal access by the Fourth Circuit's opinion probably would have been prohibited from New York City schools under the Second Circuit's opinion.

The Fifth Circuit ruled in *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989), that a public library had established a public forum with its policy permitting meetings of a "civic, cultural or educational character." 883 F.2d at 33-34. The library's policy also expressly excluded religious

expression. The Fifth Circuit found the religious exclusion violated the First Amendment when it excluded a woman's prayer group from meeting in the library's auditorium for a group prayer meeting. 883 F.2d at 34. Under the Second Circuit's opinion, this women's prayer meeting would have probably been barred from meeting in New York City schools.

Additionally, five district courts in Nevada, Kansas, New York, Wyoming and Alabama have ruled that school districts violated the First Amendment by excluding religious worship services from public schools generally open for expressive activities by community groups. All five district courts permitted worship services or religious instruction that probably would have been barred from meeting in New York City school facilities under the Second Circuit's ruling:

-- *Wallace v. Washoe County School District,* 818 F.Supp. 1346 (D. Nev. 1991) (school district may not prohibit a church from meeting in a school for Sunday morning worship services because school is generally open for use by community groups).

-- *Country Hills Christian Church v. Unified School District No. 512,* 560 F.Supp. 1207 (D.Kan. 1983) (school district may not deny church access to the school's public forum so a church can hold worship services).

-- *Randall v. Pegan,* 765 F.Supp. 793 (W.D.N.Y. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

-- *Shumway v. Albany School District No. 1,* 826 F.Supp. 1320 (D.Wyo. 1993) (school district must open its public forum to a private baccalaureate service for the graduating seniors).

-- *Verbena United Methodist Church v. Chilton County Board of Education*, 765 F.Supp. 704 (M.D.Ala. 1991) (school district must open its public forum to a privately-run baccalaureate service for the graduating seniors).

Five federal circuit courts and five district courts ordered school districts and a public library to permit religious worship and instruction in forums created by policies very similar to the one in this case. Yet the Second Circuit upheld the ban on religious services and instruction. The Second Circuit's decision conflicts with this Court's decisions permitting religious worship and instruction in public forums in such cases as *Widmar v. Vincent*, 454 U.S. 263 (1981), *Board of Education v. Mergens*, 496 U.S. 226 (1990) *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993) and *Fowler v. Rhode Island*, 345 U.S. 67 (1953). This Court should grant review in this case to resolve the conflict between the Second Circuit's decision and the cases described above, and to confirm that religious services and instruction cannot be excluded from a public forum generally open to the public for expressive activity.

B. This Court Indicated in *Lamb's Chapel* That New York Education Law §414 Created An Open Forum, But the Second Circuit Refused to Follow this Court's Lead.

This Court strongly indicated in *Lamb's Chapel* that the Second Circuit has erred with its repeated rulings that N.Y. Education Law §414 (and a school district policy based on the law) creates only a limited forum and not a public forum.

> The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for such a wide

> variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end (citations omitted). Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. **The argument has considerable force,** for the District's property is heavily used by a wide variety of private organizations .... We need not rule on this issue ....

Lamb's Chapel, 508 U.S. at 392 (emphasis added).

This Court resolved *Lamb's Chapel* on the basis of the viewpoint discrimination in the case. This case presents the clear-cut content discrimination issue that this Court said "has considerable force" in *Lamb's Chapel*, but was left unanswered. The Second Circuit refused to agree that this Court dropped an "anvil-like hint" (App. 9a and 23a) in *Lamb's Chapel* that the Second Circuit had erred. Therefore, the Second Circuit refused to reverse its repeated earlier rulings that N.Y. Education Law §414 creates only a limited forum, not a public forum. This is at least the fourth case in which the Second Circuit has insisted that the state statute creates only a limited forum, contrary to this Court's precedents. *See Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 680 (2d Cir. 1988); *Travis v. Owego-Apalachin School District*, 92 F.2d 688, 692 (2d Cir. 1991) and *Lamb's Chapel*, 959 F.2d at 387 (2d Cir. 1992).

This is not a situation in which the Second Circuit has made one aberrational decision that its judges will correct in some future case. The Second Circuit has now refused four times to apply this Court's decisions in *Widmar, Mergens* and *Lamb's Chapel*. That court has repeatedly rejected this Court's equal access precedents, and has openly refused to "take the hint" this Court gave in *Lamb's Chapel* that New York law does indeed create an open forum with a content-based exclusion of religious speech.

This Court should grant review of this case and speak directly to the issue it addressed only parenthetically in *Lamb's Chapel* -- whether N.Y. Education Law §414 creates a public forum which requires the School District to justify its content-based exclusions of religious expression with a compelling state interest.[3]

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[3] The Church also raises a viewpoint discrimination claim. The Second Circuit is in conflict with the Tenth Circuit's decision in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied.*, 117 S. Ct. 360 (1996). However, the case would be best resolved on the basis of content discrimination as this Court did in *Widmar*. Although this Court could resolve this case on the grounds of viewpoint discrimination, Judge Cabranes' dissenting opinion illustrates the problem with addressing this case solely as one of viewpoint discrimination. Judge Cabranes pointed out correctly that the policy permits "instruction" in the forum, but disallows religious instruction, which is viewpoint discrimination under *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S.Ct. 2510 (1995). However, Judge Cabranes agreed with the majority that the School District could ban religious worship from the forum. This means that under Judge Cabranes' reasoning, the church members could meet in the school to hear the sermon preached (because it is "instruction" permitted under the policy), but could not sing hymns or pray (because they are prohibited religious worship). This Court should resolve this case as it did in *Widmar* by ruling that the School Board has created a public forum with an unconstitutional content-based exclusion of religious worship and instruction.

C. The Policy Does Not Create a Limited Forum.

This Court should grant review to correct the Second Circuit's distorted concept of a "limited forum." The Second Circuit's position is that if there is any exclusion at all, the forum is limited, and the exclusions are judged by a reasonableness standard. App. 8a-9a. This circular reasoning guts this Court's forum doctrine. Under the Second Circuit's standard, this Court erred by ruling in favor of the student religious group in *Widmar* because the University really had a "limited forum" -- everyone can meet on campus for any purpose except religious worship.

N.Y. Education Law §414 does not create a limited forum, as the Second Circuit has ruled in this case and earlier held in three other cases. The forum is not limited to a specific subject matter or limited to a certain group of people, as a limited forum requires. *See Perry*, 460 U.S. at 45 n.7. The Church is eligible to meet in the forum under the policy and has done so twice for nonreligious meetings. Practically, there is no limit to the speech that can be expressed in the forum --except that it cannot be a religious service or religious instruction.

This Court should take this case to declare that in order to create a genuine "limited forum," the government must limit the forum to a clear category of people (e.g., students or employees), or a clear category of subject matter (*e.g.*, the agenda before a town council meeting, or a government theater dedicated to Shakespearean-era plays). A policy that says, "everyone and every group may meet for expressive activities, but not religious worship and instruction" does not create a limited forum under the First Amendment, but an unconstitutional content-based exclusion of protected speech from an open forum, as this Court found in *Widmar*.

II.

THE SECOND CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES AND INSTRUCTION" AND "RELIGIOUS DISCUSSION"

The Second Circuit decision clearly conflicts with this Court's decision in *Widmar* by distinguishing between religious speech and religious worship. The Second Circuit essentially ruled that religious worship is less protected under the First Amendment than religious speech and other expression. The Second Circuit's decision distinguishes religious worship and instruction, on the one hand, which it said could be banned from the forum; and religious discussion, on the other hand, which it stated *Lamb's Chapel* requires it to permit. App. 16a. This distinction is flatly inconsistent with this Court's decision in *Widmar*. Although the policy bans "religious services or instruction," it permits nonschool groups to rent buildings "for the purpose of discussing religious material or material which contains a religious viewpoint ..." Policy 5.9, App. 53a. This Court addressed that specific question in *Widmar* and ruled that religious worship and religious speech are both equally protected by the First Amendment. The Second Circuit ignored *Widmar* and analyzed the case at bar as if this Court intended *Lamb's Chapel* to somehow overrule or eclipse *Widmar*.

This Court never intended any such thing and has repeatedly rejected the argument that the Constitution requires government to permit religious speech but allows it to prohibit religious worship in a public forum. In *Widmar*, this Court stated:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious**

> **worship** and **discussion**. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added).

In *Widmar*, This Court devoted an extensive footnote explaining that religious worship and religious speech are both equally protected equally under the Free Speech Clause, giving three reasons. *See Widmar*, 454 U.S. at 269, n. 6.

The first reason this Court gave rejecting the distinction was that there is no intelligible way to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269, n. 6.

The second reason why this Court in *Widmar* refused to make a constitutional distinguish between "protected" religious speech and "unprotected" religious worship is that the government and courts would have to delve deeply into a religious group's affairs in violation of the Establishment Clause in order to make the distinction:

> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer (citations omitted). Merely to draw

> the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases (citations omitted).

Widmar, 454 U.S. at 269, n. 6.

The third reason this Court gave in *Widmar* was that there is no good reason to protect "religious speech" only and not protect "religious worship" under the Constitution.

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Widmar, 454 U.S. at 269, n. 6.

This Court repeated this principle in its majority opinion of *Capitol Square Review Bd. v. Pinette*, 132 L.Ed.2d 650 (1995):

> Indeed, in Anglo-American history, at least, government suppression of speech has so

> commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, **or even acts of worship**, *Widmar,* supra at 269, n. 6.

Pinette, 132 L.Ed.2d at 660. (emphasis added).

By the wording of its policy, the School District apparently thinks this Court ruled in *Lamb's Chapel* that the Constitution protects religious speech more than it does religious worship. The Second Circuit affirmed that misunderstanding in its decision. But *Lamb's Chapel* in no way overruled *Widmar*. The decisions complement each other and are not in conflict. Although this Court resolved *Lamb's Chapel* on the basis of viewpoint discrimination, this Court did not intend for *Lamb's Chapel* to nullify its earlier ruling in *Widmar* that the Free Speech Clause equally protects religious worship and religious speech. The Second Circuit needlessly pits *Lamb's Chapel* against *Widmar,* and creates confusion in this area of First Amendment jurisprudence.

This Court should grant review and reject the School District's distinctions between religious worship and instruction (which it bans from the forum) and religious discussion, (which it permits in misguided deference to this Court's decision in *Lamb's Chapel*). This Court refuted that confusing distinction in *Widmar* and needs to do so again.

Additionally, this Court should grant review and rule that under the First Amendment, the government cannot and should not determine what is permitted "religious discussion," and what is prohibited religious worship or instruction.

III.

THE POLICY VIOLATES THE CHURCH'S RIGHTS UNDER THE ESTABLISHMENT CLAUSE, THE FREE EXERCISE CLAUSE AND THE EQUAL PROTECTION CLAUSE

The Second Circuit rejected the Church's arguments that N.Y. Education Law §414 and School District's policy violate the Establishment Clause, the Free Exercise of Religion Clause and the Equal Protection Clause. The basic violation is similar under all three constitutional provisions -- the state statute and the policy single out religious services and instruction for disparate and hostile treatment. The Second Circuit saw no merit it any of the claims. App. 17a-20a. This Court should grant review to reverse the Second Circuit's calloused application of those constitutional provisions in this case.

A. The Statute and the Policy Violate the Establishment Clause.

The School District's policy violates the Establishment Clause by singling out religious services and instruction for treatment worse than other expression by community groups. The Establishment Clause requires government neutrality toward religion. "[T]he government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). Government can violate the Establishment Clause's neutrality principle by treating religion worse than other groups, as well as by favoring religion. The School District violates that neutrality principle in this case. As this Court stated in *Mergens*, 496 U.S. 226 (1990):

> if a State refused to let religious groups use facilities open to others, then it would

> facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Mergens, 496 U.S. at 248. The Second Circuit rejected this argument by stating that this principle only applied to a public forum, and not to a limited forum. App. 18a. There is no precedent for such a remarkable application of Establishment Clause jurisprudence, and this Court should reject it.

B. The Statute and the Policy Violate the Free Exercise Clause.

N.Y. Education Law §414 and the School District's policy blatantly violate the Free Exercise Clause because they single out religious expression and treat it worse than other speech topics. Under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court stated that government actions violate the Free Exercise Clause if they "impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. This Court repeated that point In *Church of the Lukumi Babalu Aye v. City of*, 508 U.S. 520 (1993):

> There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, **for the minimum requirement of neutrality is that a law not discriminate on its face**. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

The Second Circuit ruled that there was no violation of the Free Exercise Clause because the policy excludes the worship and instruction of all religions. App. 19a. Such an extreme interpretation means government may openly discriminate against religious practices, as long as it excludes all of them. This Court has never interpreted the Free Exercise Clause to allow "equal opportunity" discrimination against all religious expression, and in fact has ruled just the opposite. This Court should grant review and reverse the Second Circuit's decision because it fails to grant any protection to the free exercise of religion that is so blatantly infringed upon in this case.

C. The Statute and the Policy Violate the Equal Protection Clause.

The Second Circuit erred in denying the Church's claim under the Equal Protection Clause. In *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court ruled that content-based restrictions of free speech violate the Equal Protection Clause. The unconstitutional ordinances in *Mosley* "describe[d] permissible picketing in terms of its subject matter," 408 U.S. at 95. *Mosley* dealt with a content-based ban on speech, as in this case. Nonetheless, the Second Circuit rejected the Church's equal protection claim. This Court should grant review and reverse the Second Circuit's conclusion that no equal protection violation exists in this case.

CONCLUSION

For the reasons expressed above, petitioners respectfully ask this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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February 19, 1998

THE BRONX HOUSEHOLD OF FAITH; JACK ROBERTS; ROBERT HALL, Plaintiffs-Appellants,

v.

COMMUNITY SCHOOL DISTRICT NO. 10; CHARLES WILLIAMS, in his official capacity as President of the Board of Education for Community School Board District No. 10; THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Defendants-Appellees.

Docket No. 96-9633

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

127 F.3d 207; 1997 U.S. App. LEXIS 24202

September 15, 1997, Decided

SUBSEQUENT HISTORY: As Amended September 24, 1997.
PRIOR HISTORY: Appeal from a summary judgment for defendants entered in the United States District Court for the Southern District of New York (Preska, J.) in an action challenging on constitutional grounds the refusal of defendants to make a public school auditorium available to plaintiff Church as a place of weekly religious worship, the district court having determined that the school district had created a limited public forum with reasonable restrictions limiting its use to nonexclusive purposes.

DISPOSITION: Affirmed.

COUNSEL: JORDAN W. LORENCE, Fairfax, VA (Joseph P.

Infranco, Commack, NY, of counsel), for Plaintiffs-Appellants.

STUART D. SMITH, Assistant Corporation Counsel of the City of New York, New York, NY (Paul A. Crotty, Corporation Counsel, Barry P. Schwartz, Assistant Corporation Counsel, New York, NY, of counsel), for Defendants-Appellees.

(Marvin E. Frankel, Jeffrey S. Trachtman, Eric A. Tirschwell, Kramer, Levin, Naftalis, & Frankel, New York, NY, of counsel), for Amicus Curiae National Committee for Public Education and Religious Liberty.

(Jay Worona, General Counsel, Louis Grumet, Executive Director, New York State School Boards Association, Inc., Albany, NY, of counsel), for Amicus Curiae New York State School Boards Association, Inc.

(Steven T. McFarland, Kimberlee Wood Colby, Samuel B. Casey, Center for Law and Religious Freedom, Christian Legal Society, Annandale, VA, of counsel), for Amici Curiae Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Evangelical Lutheran Church in America, Family Research Council, Focus on the Family, and National Association of Evangelicals.

JUDGES: Before: VAN GRAAFEILAND, MINER and CABRANES, Circuit Judges. Judge Jose A. Cabranes concurs in part and dissents in part in a separate opinion.

OPINIONBY: MINER

OPINION: MINER, Circuit Judge:

Plaintiffs-appellants The Bronx Household of Faith (the

"Church"), an evangelical Christian church, and Jack Roberts and Robert Hall, its pastors, appeal from a summary judgment entered in the United States District Court for the Southern District of New York (Preska, J.) in favor of defendants-appellees Community School District No. 10 ("District # 10"), Charles Williams, President of the Board of Education of District # 10, and the Board of Education for the City of New York. The action was brought to challenge the refusal of defendants to permit the use of the gymnasium-auditorium of a District # 10 public school, the Anne Cross Mersereau Middle School ("M.S. 206B"), by the Church for weekly religious worship services. Originally filed in the Supreme Court of the State of New York, Bronx County, the complaint in the action set forth various claims pleaded under the provisions of 42 U.S.C. § 1983 and New York's declaratory judgment statute, N.Y. C.P.L.R. § 3001 (McKinney 1991): violation of the Free Speech, Free Exercise of Religion and Establishment of Religion Clauses of the First Amendment; violation of the Equal Protection Clause of the Fourteenth Amendment; and violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

District # 10 removed the action to the Southern District, where both sides moved for summary judgment. In granting summary judgment to the defendants, the district court rejected the First Amendment Free Speech claim after first determining that the Board of Education had created a limited public forum; that the restrictions imposed on the use of the forum were reasonably related to matters of legitimate government concern; and that the concern was to "preserve and prioritize access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities." The court dismissed the remaining claims without analysis. On appeal, the appellants advanced the same arguments that they advanced before the district court. We affirm the dismissal of

the Free Speech claim but disagree with the district court's analysis of "non-exclusive use." We also reject the claims unaddressed by the district court.

BACKGROUND

The use of school property for the purposes of religious worship is not among the uses designated by the New York Legislature for public schoolhouses and school grounds in New York State. However, New York Education Law does permit local school districts to adopt regulations permitting the use of such property for a great number of other purposes: educational instruction; public libraries; social, civic and recreational meetings and entertainments, and other community welfare uses, provided such uses are "non-exclusive and open to the general public"; meetings where admissions fees are charged, if the fees are expended for charitable or educational uses except for the uses of religious sects or certain exclusive societies; polling places; civic forums and community centers; classes for instruction of mentally retarded minors; recreation, physical training and athletics; child care services when school is not in session; and "graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed." N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1997).

Pursuant to § 414, the New York City Board of Education has established a written policy governing the use of school buildings and school grounds under its jurisdiction. The policy is entitled "Standard Operating Procedures: Topic 5: Regulations Governing The Extended Use of School Facilities" ("SOP"). The SOP provides that the primary use of school premises is for Board of Education activities, and that the next preference will be given to community, youth and adult group activities. The SOP then specifies the following additional

categories of permitted uses for school premises in the City of New York:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools.

Most pertinent to the appeal before us are the provisions of SOP 5.9:

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

District # 10, a public school district in the Borough of Bronx, New York City, is subject to the jurisdiction of the New York City Board of Education. M.S. 206B is a middle school facility within District # 10, with students ranging in age from 9 through 12 in grades 5 through 7. The parties agree that the use of District # 10 property is governed by the SOP and that the following organizations were permitted to use District # 10 facilities for the following purposes during the 1994-95 school year: ACAP, Inc., for a program of training and drill exercises for young people between the ages of 10 and 21; Alliance for Education, for tutoring students ages 9-12 in math and English; Boy Scouts, for training of adolescent boys in various skills, including camping and first aid; Bronx School of Music, a private school, for a concert performed by its students; Bronx YMCA, for an after-school program to tutor students ages 7-13 in math, reading and English; Bronx Youth Service, for an after-school study center tutoring students ages 7-13 in math and English; Crotona Coalition, for workshops for students on subjects such as drugs and AIDS; Edgemont Day Care, for a first aid and CPR course for its staff workers; Girl Scouts, for training girls in skills and character, including instruction in crafts, reading and other matters; Grace Lutheran Church, for a program on Black History Month; Greek Orthodox Community of Riverdale, for an afternoon school to teach young people the Greek language and history; Kingsbridge Heights, for an after-school program for students, including supervised homework assistance and instruction in dance and computer classes; Mosholu Community, for a school program for students including job preparation for teenage students and computer classes; Mount Hope Housing, for a leadership training program and other programs for students; Pius XII Beacon, for programs including after-school tutoring and character training, with no religious content; RDK West Camps, for the operation of youth programs, including crafts,

movies and games; Riverdale Community Center, for adult education classes that prepare adults to take and pass the GED exam and for after-school care and training for young people ages 7-13; South Fordham, for an afterschool program for youth; and West African Association, for a concert combining ethnic music and theater.

On one occasion in 1994 and on another occasion in 1995, the Church rented the M.S. 206B building for programs of sports and games. The Church also rented the building once in 1995 for a banquet. However, the request by the Church to rent the gymnasium at M.S. 206B "for the purpose of conducting church worship services" each Sunday was denied. In his letter to Frank Pagliuca, a District # 10 official, seeking approval for the request, Pastor Hall noted that the services would include "hymn singing, communion, Bible reading, Bible preaching and teaching." After permission was denied by Mr. Pagliuca on the basis of the SOP provision prohibiting the after-school use of school facilities by outside organizations for religious services or instruction, Pastor Hall wrote to District # 10 Superintendent Irma Zardoya. He advised Superintendent Zardoya that the Church "is a Christian church of the historic Biblical persuasion," that use of the M.S. 206B facility was necessary because of overcrowding in the Church's present meeting location and that SOP 5.9 was unconstitutional. He concluded his letter by asking that his request for use of the school facilities be reconsidered. The permit application again was denied, and the action giving rise to this appeal ensued.

In the Joint Stipulated Facts submitted to the district court, the parties stipulated as follows:

Community School District 10 has consistently followed Policy 5.9 by never renting school facilities to non-school groups or organizations, including Bronx Household of Faith,

for the purpose of conducting religious worship services and religious instruction on school premises.

DISCUSSION

I. The Freedom of Speech Claim

A. Nature of the Forum

Freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered. The Supreme Court has identified three types of forums: the traditional public forum; the designated public forum, sometimes called the "limited public forum"; and the nonpublic forum. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Traditional public forums include streets, parks and places that "by long tradition . . . have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Restrictions of speech on such property are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802; *see also Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991). But restrictions on access based on speaker identity and subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint

neutral." *Cornelius,* 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). Where the proposed use falls outside of the limited forum, "the State is subject to only minimal constitutional scrutiny." *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996).

A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. *See Perry,* 460 U.S. at 46. In such a forum, the government may make "distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49.

Appellants first contend that M.S. 206B is an open public forum from which their religious worship and religious teaching activities cannot be excluded absent a compelling state interest. In support of this contention, appellants rely on *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), in which they say that "the U.S. Supreme Court dropped an anvil-like hint that it thought this Court was incorrect in ruling that no open forum existed in that case." *Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 388 (2d Cir. 1992). The "hint" to which appellants refer was the Supreme Court's statement in *Lamb's Chapel* that "the argument [for an open forum] has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a 'close question,' which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses." 508 U.S. at 391. An argument that has "considerable force" in one case may not have quite the same force in another, however. Also, an argument of considerable force is not necessarily a winning argument. In any event, the Supreme Court in *Lamb's Chapel* specifically declined to rule on the open forum question, stating that "even if the courts below

were correct in this respect -- and we shall assume for present purposes that they were -- the judgment below must be reversed." *Id.* at 391-92.

In *Lamb's Chapel*, an evangelical church sought permission to use public school facilities in Center Moriches, New York, to show a six-part film series on Child Rearing and Family Issues. The series was said to emphasize traditional Christian family values and thereby was designed to counteract the undermining influences of the media. Relying on the state education law and local rules similar to those adopted by the New York City Board of Education specifying permissible uses, the Center Moriches School District denied use of school premises for the film series. The rule prohibiting religious uses was even more stringent than the prohibition imposed by the New York City Board of Education. It provided that "the school premises shall not be used by any group for religious purposes." *See id.* at 387 (alteration in *Lamb's Chapel*). In reversing this Court, and in allowing the use sought, the Supreme Court concluded that the rule in question was unconstitutionally applied. In arriving at that conclusion, the Court found:

There is no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted . . . . That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication . . . that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid . . . .

Id. at 393-94. What the Court therefore found unacceptable was the fact that the film series, dealing with subject matter

otherwise permissible under the school district's rule, was blocked solely because it dealt with the subject matter from a religious viewpoint.

SOP 5.9, while prohibiting outside organizations from the after-school use of school premises in District # 10 for religious services or instruction, specifically permits use by such organizations "for the purposes of discussing religious material or material which contains a religious viewpoint." Presumably, the showing of the film series described in *Lamb's Chapel* is permissible under the rules governing District # 10. What is not permitted under SOP 5.9 is the use of school premises for worship or religious instruction, and it is important to note that the parties have agreed that District # 10 never has rented school property for that purpose. This limitation is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects. It would seem to go without saying that certain types of speech may be prohibited in public schools, even after school hours. M.S. 206B simply is not a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice. *Cf. Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1378-79, 1382 (3d Cir. 1990) (permitting indiscriminate access tc high school facility created open forum so as to allow use of facility after school hours for religious speech and worship). It is not an open public forum as that term has been defined by the Supreme Court.

Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981), upon which appellants rely in connection with their arguments for an open forum, is inapposite. In that case, a student religious group was denied permission to use the facilities of a public university on the basis of the university's regulation prohibiting the use of buildings and grounds for religious worship or religious teaching. The Court found that

the university had created a forum generally open for use by student groups. *See id.* at 267. Accordingly, the Court applied the standard of review for content based exclusions -- the need to show a compelling state interest and a regulation narrowly drawn to achieve that end -- and found the standard unmet. A public university is, of course, much different from a public middle school in terms of traditional openness. *See id.* at 267 n.5 ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *Healy v. James*, 408 U.S. 169, 180-81, 33 L. Ed. 2d 266, 92 S. Ct. 2338 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." (quotation omitted)); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self-evident.").

The Supreme Court assumed a limited forum in *Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), for the purpose of holding unconstitutional the denial of student activity fee funds to a newspaper with religious editorial viewpoints published by an on-campus religious group. Applying its holding in *Lamb's Chapel*, the Court reiterated the distinction to be made between discrimination against speech because of its subject matter, considered permissible to preserve the purposes of the limited forum, and viewpoint discrimination, considered impermissible if directed against speech within the limitations of the forum. *See* 115 S. Ct. at 2517. SOP 5.9 preserves that distinction by prohibiting religious worship and religious instruction by outside groups, a prohibition that state authorities consider necessary to preserve the purposes of the limited public school

forum, and by specifically permitting religious viewpoint speech in relation to matters for which the public school forum is open.

The Equal Access Act cases cited by appellants are not helpful in defining the nature of the forum. While public secondary schools that receive federal financial assistance and maintain limited open forums are constrained by the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, to afford official recognition to student religious groups desiring to conduct non-curricular activities, *see, e.g., Board of Educ. v. Mergens*, 496 U.S. 226, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990); *Ceniceros v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir.), *cert. denied*, 136 L. Ed. 2d 534, 117 S. Ct. 608 (1996); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993), the Equal Access Act is inapplicable in the case before us. The *Mergens* line of cases also is inapposite because we are confronted here with the issue of whether an outside religious organization can be barred from the use of a middle school for worship on the basis of a regulation that bars religious services but permits speech from a religious viewpoint on subjects for which the forum is open.

Also to be distinguished is *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied*, 136 L. Ed. 2d 251, 117 S. Ct. 360 (1996). In that case, there was a request to show a film on the life of Jesus at a senior citizen center and the film included an invitation by the narrator to adopt the Christian religion and to join him in a prayer. That request was denied, a denial that the Tenth Circuit found discriminatory under the circumstances. The City that operated the center had adopted a regulation prohibiting the use of its senior citizen facilities "for sectarian instruction or as a place of religious worship." *See id.* at 1277. That regulation was

promulgated pursuant to a federal statute providing federal funding conditioned on a similar prohibition. Relying on *Lamb's Chapel*, the Tenth Circuit found that the restriction was not viewpoint neutral, since the City's senior citizen centers had been opened to other public presentations regarding the Bible. *See id.* at 1279. In contrast, the forum in the case before us never has been opened to such presentations. The circumstances of the case before the Tenth Circuit therefore were closely akin to the circumstances presented in *Lamb's Chapel*. However, to the extent that the Tenth Circuit suggests that sectarian instruction would have been permissible "even if the City had not previously opened the Senior Centers to presentations on religious subjects," *id.*, we respectfully disagree with that dictum. Moreover, we think that it is reasonable to impose greater restrictions upon the use of a middle school as a public forum than upon the use of a senior citizen center for that purpose, even in connection with after-school use.

B. Reasonableness and Viewpoint Neutrality

Having identified the public forum of M.S. 206B as a limited one, we are confronted with the question of whether the rule prohibiting religious services and instruction is reasonable and viewpoint neutral. We were faulted in *Lamb's Chapel* for "uttering not a word in support of [our] reasonableness holding," *Lamb's Chapel*, 508 U.S. at 393 n.6, in regard to the regulation in that case. We think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship. We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church. We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating

their school as a church. And we think that it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services. Education, after all, is a particularly important state function, and the use of school premises is properly a matter of particular state concern. Finally, it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City.

With respect to the element of viewpoint neutrality, the regulation in question specifically permits any and all speech from a religious viewpoint. What it does not permit is religious worship services. The parties agree that M.S. 206B never has been made available for worship services to any outside group. The school, therefore, cannot be said to have been opened to indiscriminate public use either by policy or practice. The purposes for which the schools in District # 10 have been opened to outside organizations encompass a wide variety of civic and social uses, and any speech conducted in connection with those uses may be bottomed on a religious viewpoint. Worship and religious instruction are forms of speech and cannot be prohibited in an open forum such as a public university. *See Widmar*, 454 U.S. at 269 n.6. Indeed, religious worship services may well be considered the ultimate in speech from a religious viewpoint in an open forum. But the question is whether a distinction can be drawn between it and other forms of speech from a religious viewpoint that District # 10 has elected to allow in the limited forum of a public middle school. We think it can.

What SOP 5.9 is intended to do seems clear: it is intended to prohibit outside groups from using school premises after school for "religious services or religious instruction" while permitting such groups to use school premises for "discussing religious

material or material which contains a religious viewpoint or for distributing such material." In adopting this language, it appears that the New York City Board of Education has attempted meticulously to comply with the teaching of *Lamb's Chapel.*

Appellants concede that what they seek is specifically prohibited by SOP 5.9. They seek to undertake at M.S. 206B on a regular basis the ceremonies, prayers, rites, rituals and religious forms commonly associated with religious services, as well as the teaching commonly associated with the promulgation of religious faith. According to Pastor Hall, the Church proposed to conduct "church worship services," which he described as "including hymn singing, communion, Bible reading, Bible preaching and teaching." In short, what Pastor Hall was proposing was to conduct the religious activities that take place according to a prescribed form and order commonly known as religious services.

There is no question that District # 10 never permitted the use of its premises for these purposes. The District apparently has been prepared to allow the use of its premises for the discussion of religious material in a secular setting and to allow the discussion of secular matters from a religious viewpoint, although the record discloses no request for such use. The distinction between these uses on the one hand, and religious services and instruction on the other, is not difficult for school authorities to make. There is no indication that they have not maintained that distinction under a regulation that is not only reasonable in light of the purposes served by the forum but also is viewpoint neutral.

C. Exclusive Use

Contrary to the district court, we find no significance for this

case in the statutory and SOP provisions requiring that the use of school premises for meetings be non-exclusive. SOP 5.6.2 tracks the language of Education Law § 414(c) in permitting use for "social, civic and recreational meetings and entertainments" that are "non-exclusive and . . . open to the general public." But religious services and instruction are not social, civic or recreational meetings or entertainments. In any event, there is no indication in the record that the Church's services and instruction are not open to the general public. The district court also notes that Standard Operating Procedure 2.11 tracks Education Law § 414(d) in permitting use of school premises for meetings where admission fees are charged, except if "such meetings are under the exclusive control . . . of a religious sect or denomination." However, the record contains nothing about fees for admission to the Church's services. Finally, since the state statute does not include religious services or instruction among permitted uses of school property, and since the SOP specifically prohibits such uses, there is no need for concern about whether the religious uses are exclusive or non-exclusive here. The limitation on the use of the forum in question is clear, reasonable and viewpoint neutral, and that is all it needs to be to pass constitutional muster.

II. The Establishment and Free Exercise Claims

The First Amendment to the United States Constitution, as applicable to the states under the Fourteenth Amendment, prohibits the enactment of any "law respecting an establishment of religion." Neither the State of New York nor the New York City Board of Education has adopted such a law with respect to the use of M.S. 206B. Appellants' establishment claim in this regard seems to be based on the argument that the Board of Education improperly invoked the Establishment Clause to justify its ban on religious services and instruction. But as has

been shown, there is no need for the Board of Education to rely on the Establishment Clause in limiting the use of the public school forum, since the distinctions drawn in the SOP are both reasonable in light of the permitted after-school uses of the forum and viewpoint neutral as well. The cases cited by appellants for the proposition that "government can violate the Establishment Clause's neutrality principle by treating religion worse than other groups" are inapposite, because they pertain to traditional public forums, *see, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2447, 132 L. Ed. 2d 650 (1995), or to a limited forum where the "viewpoint neutral" rule has been violated, *see, e.g.*, *Lamb's Chapel,* 508 U.S. at 395.

The First Amendment also prohibits the enactment of any law "prohibiting the free exercise" of religion. Appellants contend that "the School District flagrantly violates the Free Exercise Clause by singling out religious services and instruction for exclusion from its forum." To support this contention, appellants cite *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). Each of these cases involved specific religious practices--the ingestion of peyote in *Smith* and animal sacrifice in *Church of the Lukumi*.

Smith involved a state law prohibiting the payment of unemployment benefits to persons discharged for misconduct. The law was applied in the case of employees of a drug rehabilitation organization who were discharged for the use of peyote at a ceremony of the Native American Church. The Supreme Court found that the state statute was a valid and neutral law of general applicability and properly enforceable as such. *See Smith*, 494 U.S. at 890.

In *Church of the Lukumi*, the municipal ordinances of the City of Hialeah prohibiting animal sacrifice were challenged by a church of the Santeria religion. The challenge was sustained by the Supreme Court on a finding that the ordinances were not neutral but rather had as their object the suppression of a central element of the Santeria religion. *See Church of the Lukumi*, 508 U.S. at 542. The Court also found that the ordinances were not of general applicability, *see id.* at 545-46, and could not survive strict scrutiny, *see id.* at 546-47.

The state statute and SOP under consideration in this case do not bar any particular religious practice. They do not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to practice their religion, albeit in a location separate from M.S. 206B. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. That right has not been taken from the members of the Church.

III. The Equal Protection Claim

Appellants rely upon *Police Department v. Mosley*, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972), to support their claim that the Equal Protection Clause of the Fourteenth Amendment does not allow the exclusion of religious worship services from the public schools. In *Mosley*, the challenged Chicago ordinance prohibited picketing on public streets near school buildings. In that case, the Court found that under the Equal Protection Clause and the First Amendment, the public street was a traditional public forum where content-based restrictions must be narrowly tailored to serve a compelling governmental interest. Again, appellants rely upon a case that pertains to a traditional public forum. Appellants contend that

the strict scrutiny test should be applied in connection with the rules prohibiting religious worship services and instruction. However, there is no fundamental right that has been violated. Appellants say that the School District has infringed on the fundamental rights of freedom of speech and freedom of religion. There is no fundamental right of freedom of speech in a limited forum from which various types of speakers and subjects are properly excluded. Nor is the free exercise of religion a fundamental right in a properly limited public forum. *Cf. Fighting Finest*, 95 F.3d at 231. It is only when a traditional public forum "is opened up to assembly or speaking by some groups [that] government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Mosley*, 408 U.S. at 96.

IV. The Religious Freedom Restoration Act Claim

Appellants contend that the School District violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, by using a clear religious classification to deny access to the forum and thereby imposing a significant burden on the religious beliefs of the appellants. The threshold issue under the Act is whether religious practices have been substantially burdened. *See* 42 U.S.C. § 2000bb-1(a). A "substantial burden" under the Act is a government policy prohibiting religious adherents from engaging in conduct that is mandated by their faith. *See Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). The denial of the use of public property for religious services would not seem to substantially burden religious exercise. In any event, this claim is moot, the Act having been held unconstitutional in *City of Boerne v. Flores*, 138 L. Ed. 2d 624, 117 S. Ct. 2157, 2172 (1997). The Court in that case held that Congress had exceeded its Fourteenth Amendment powers when it passed the Act. See id. The Court remarked that the Act represented "a considerable congressional intrusion into the

States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." 117 S. Ct. at 2171. The traditional prerogatives and general authority of the State of New York to regulate for the health and welfare of its citizens should prohibit judicial interference with the establishment of a limited forum in New York schools from which after-school use for religious services and instruction may be barred.

CONCLUSION

The judgment of the district court is affirmed in accordance with the foregoing.

CONCURBY: JOSÉ A. CABRANES (In Part)

DISSENTBY: JOSÉ A. CABRANES (In Part)

DISSENT:
JOSÉ A. CABRANES, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that in addressing the important free speech questions presented in this case, we must apply the level of scrutiny appropriate to governmental restrictions of speech in "limited public forums." Despite the fact that New York Education Law § 414 and school board policy opened the schools to a wide variety of different speakers, and despite the fact that the Supreme Court, analyzing the same statute under similar circumstances, found "considerable force" in the argument that such restrictions of speech "were subject to the same constitutional limitations as restrictions in traditional public forums," *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), we are constrained by controlling precedents

of this Court and the factual stipulations of the parties to find that the school facilities in this case constituted only a limited public forum. Governmental restrictions of speech in limited public forums will be upheld only if the restrictions are reasonable and viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995).

I concur in the Court's judgment insofar as it holds the ban on "religious services" by Community School District No. 10 ("District") to be reasonable and viewpoint neutral. However, because I believe that the District's ban on "religious instruction" discriminates on the basis of viewpoint by allowing private groups to conduct after-school instruction on a wide array of topics only from a secular perspective, I dissent from that part of the Court's judgment upholding the ban on "religious instruction."

I.

In *Deeper Life Christian Fellowship, Inc. v. Board of Education,* this Court adopted an intermediate state court's construction of New York Education Law § 414, *see Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978), that the use of New York schools is limited to nonreligious purposes, and therefore concluded that in enacting this statute the state intended to create only a limited public forum. 852 F.2d 676, 680 (2d Cir. 1988) (*Deeper Life I*). Because *Trietley* was decided before the Supreme Court's landmark ruling in *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (holding that public university could not exclude religious worship and teaching from public forum), it may well be that the state court in *Trietley* based its decision on a now-outdated understanding of the Establishment Clause. Nevertheless, *Deeper Life I* was decided subsequent to

Widmar, and its adoption of *Trietley*'s reading of § 414 was reaffirmed in *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991) (*Deeper Life II*), and again in *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 387 (2d Cir. 1992), *rev'd on other grounds*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). The Supreme Court in *Lamb's Chapel* described the very argument pressed by plaintiff in this case--that § 414 and school district policy created a fully-open public forum, not a limited public forum excluding religious uses--as having "considerable force." 508 U.S. at 391. However, the Court ultimately left unresolved the question whether a school that opens its facilities indiscriminately, except as to a very narrow class of excluded communicative uses, may still claim to have created only a limited public forum. *Id.* at 391-92. Therefore, in light of our obligation to follow the decisions of prior panels of this Court unless they have been overruled by a holding of the Supreme Court, *see Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (holding of prior panel "can only be overruled by this Court sitting in banc or by a decision of the Supreme Court"), we are not free to follow the Supreme Court's strong suggestion, in what is concededly dicta, even though it may amount to an "anvil-like hint," *see ante*, at 6538 (quoting Appellant's Brief at 16).

In addition, we are foreclosed from exploring whether prior practices of the District in the instant case may have opened the forum to religious services or instruction, see *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693 (2d Cir. 1991) (holding that where school has allowed its facilities to be used for particular category of activities, it creates forum that must remain open to category of activities "exemplified by the prior permitted use"), by the unusually sparse record in this case (covering uses of the school during only a single school year) and by the stipulation of the parties that the District "has

consistently followed Policy 5.9 by never renting school facilities to non-school groups or organizations . . . for the purpose of conducting religious worship services and religious instruction on school premises." Joint Stipulated Facts at 9.

Accordingly, I agree that in the circumstances presented here, SOP 5.9 must be judged by the standard reserved for restrictions on speech in limited public forums. We will uphold such restrictions if they are "reasonable in light of the purpose served by the forum," and they do not "discriminate against speech on the basis of its viewpoint." *Rosenberger*, 115 S. Ct. at 2517 (internal citations and quotation marks omitted). Because I believe that the provision of SOP 5.9 banning "religious instruction" is viewpoint discriminatory under the Supreme Court's decisions in *Lamb's Chapel* and *Rosenberger*, I would hold that provision unconstitutional under the Free Speech Clause of the First Amendment to the United States Constitution.

II.

In *Lamb's Chapel*, the Supreme Court rejected as viewpoint discriminatory a school district's denial of a permit for a church-sponsored film series dealing with family and child-rearing issues from a religious perspective. 508 U.S. at 394. The school district, pursuant to New York Education Law § 414, had established a policy permitting school facilities to be used after school hours for "social, civic, and recreational" purposes, but not for "religious purposes." *Id.* at 386-87. The Court found there to be "no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by [school district policy]," *id* at 393, nor "any indication . . . that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the

presentation would have been from a religious perspective," *id.* at 393-94. The denial of the permit therefore violated the principle that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 394 (internal quotation marks omitted). The fact that the policy treated all religions alike was immaterial inasmuch as it discriminated between religious and secular viewpoints. *Id.* at 393.

The Court further explained that such viewpoint discrimination was impermissible, "'provided that the defendants have no defense based on the Establishment Clause,'" *id.* (quoting *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (Posner, J.)), and the Court had "no trouble" dismissing any possible Establishment Clause defense. Since the film series would have been shown after school, would not have been sponsored by the school, and would have been open to the public, and since many other private groups had used school facilities in the past for a wide variety of purposes, the Court concluded that there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Id.* at 395.

Elaborating upon its *Lamb's Chapel* decision, in *Rosenberger* the Court held that the refusal by the University of Virginia ("UVA") to fund a religiously oriented student newspaper through the school's Student Activities Fund ("SAF"), while funding a wide variety of other student groups and publications through SAF, also constituted viewpoint discrimination. 115 S. Ct. at 2517. By denying funding to publications because they "primarily promote or manifest a particular belief in or about a deity or an ultimate reality," *id.* at 2520, UVA "required public officials to scan and interpret student publications to discern

their underlying philosophic assumptions respecting religious theory and belief," id. at 2525. This contravened the Free Speech Clause because "the Government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 2516 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)). Such viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 2517 (citing *Perry*, 460 U.S. at 46).

Significantly for our purposes here, the Court expressly rejected the dissent's view that UVA could constitutionally undertake to distinguish between "works characterized by the evangelism of [the student newspaper] and writing that merely happens to express views that a given religion might approve," *id.* at 2550 (Souter, J., dissenting). *See id.* at 2524 (majority opinion). The Court observed that "were the dissent's view to become law it would require the University . . . to scrutinize the content of student speech, lest the expression in question . . . contain too great a religious content. . . . That eventually raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." *Id.*

As in *Lamb's Chapel*, the Court in *Rosenberger* discerned no Establishment Clause defense for UVA's restriction on religious speech. The Court cited numerous cases firmly providing that the Establishment Clause does not bar the government from providing benefits to religious groups or speakers on an equal basis with other groups and speakers. *See id.* at 2521-23. Funding the newspaper would not have run afoul of the Establishment Clause because UVA had not "'willfully fostered or encouraged' any mistaken impression that

the student newspapers speak for the University." *Id.* at 2523 (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2448, 132 L. Ed. 2d 650 (1995)).

In light of these teachings of the Supreme Court, I conclude that the District's exclusion of religious instruction in the instant case is not viewpoint neutral. SOP 5.6.1 sweepingly authorizes use of school premises after hours "for the purpose of instruction in any branch of education, learning or the arts." SOP 5.9, however, while allowing "discussion [of] religious material or material which contains a religious viewpoint," bans "religious instruction on school premises after school." The net effect is to require schools to put a halt to any after-school instruction that "contains too great a religious content," *Rosenberger*, 115 S. Ct. at 2524. Where secular viewpoints on a subject are concerned, the District's policy allows private groups not only to discuss the subject, but to instruct others from their secular perspective without hindrance by public authorities. Where religious viewpoints on the same subject are detected, private groups may "discuss" but they may not "instruct." Far from properly treading the delicate line between discrimination based on subject matter or content and discrimination based on viewpoint, as the majority contends, see ante, at 6541, the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination. Indeed, the distinction that the District attempts to draw between instruction and discussion is akin to the distinction drawn by the dissent in *Rosenberger*, but rejected by the Court, between "evangelism" and speech "that merely happens to express views that a given religion might approve," *id.* at 2550 (Souter, J., dissenting). *See id.* at 2524 (majority opinion).

The fact that in the instant case the parties agree that the District has previously allowed secular instruction related to "ethics" and "character," paradigmatic contexts for religious instruction, only underscores the likelihood that the District's policy on "instruction" will systematically suppress sectarian viewpoints. The record reveals that the District has in the past allowed the Boy Scouts to provide "ethical education based on the Scout Oath and Scout Law," n1 and has permitted a group called "Pius XII Beacon," organized under Catholic Charities, to conduct after-school "character training for the students [which] had no religious content." Joint Stipulated Facts at 3, 5-6. That ethics may be taught from a secular perspective but not from a religious perspective effectively places the religious viewpoint at a disadvantage in the marketplace of ideas. If the State may escape the strictures of the Free Speech Clause by merely hindering the religious viewpoint, without banning it entirely (after all, the District still allows religious materials to be "discussed"), then the long line of cases teaching that public authority over private speech must be viewpoint neutral will be easily circumvented.

n1 Although the majority's recitation of the purposes for which the school has been used in the past describes the Boy Scouts as having conducted "training of adolescent boys in various skills, including camping and first aid," ante, at 6534-35, it bears noting that the record also indicates that "ethical education" was included in the Boy Scouts' training. Joint Stipulated Facts at 3.

As in *Lamb's Chapel* and *Rosenberger*, moreover, the District's preference for secular instruction over religious instruction cannot be justified by an Establishment Clause defense. The ban on instruction from a religious perspective, far from being required by the Establishment Clause, if anything offends "the very neutrality the Establishment Clause

requires." *Rosenberger*, 115 S. Ct. at 2525. There is nothing in the record to suggest that by allowing religious instruction to take place after school hours on an equal basis with other forms of instruction the District would or could "willfully foster[] or encourage[] any mistaken impression" that the organizations conducting after-school religious instruction actually speak for the District, *Rosenberger*, 115 S. Ct. at 2523 (internal quotation marks omitted). Because the District has opened itself up so widely to other outside organizations, *see ante*, at 6534-35, while restricting use of school facilities by outside groups to after-school hours and weekends, there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed," *Lamb's Chapel*, 508 U.S. at 395.

We are not the first court to reach the issue of prohibitions on religious, but not secular, instruction. The Court of Appeals for the Tenth Circuit recently held that the City of Albuquerque's ban on "sectarian instruction" in publicly run senior-citizen centers discriminated on the basis of viewpoint and therefore violated the Free Speech Clause. *See Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). That court held that "any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint" and "intrinsically favors secularism at the expense of religion." *Id.* n2

n2 I believe the majority is incorrect in referring to this clear holding as "dictum." *Id.* The majority characterizes *Church on the Rock* as hinging upon the fact that "the City's senior citizen centers had been opened to other public presentations regarding the Bible," and attempts to distinguish the instant case on this basis. *Ante*, at 6542. However, the Tenth Circuit explicitly found that "even if the City had not previously opened the Senior Centers to

> presentations on religious subjects, its policy would still amount to viewpoint discrimination." 84 F.3d at 1278. The Court found that "any" prohibition of religious instruction by outside groups where other instruction is permitted is "inherently" viewpoint discriminatory. *Id.* The fact that the court amplified upon this holding by explaining precisely how and why the ban unconstitutionally suppressed the religious viewpoint in that case does not detract from the court's holding that the ban was unconstitutional on its face.

Because I conclude that the District's policy banning after-school religious instruction by outside groups, without banning instruction from secular viewpoints, discriminates on the basis of viewpoint, I would hold that it is unconstitutional under the Free Speech Clause of the First Amendment.

Unlike religious "instruction," there is no real secular analogue to religious "services," such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism. Indeed, the dictionary definition of the term "services" in this context suggests as much: "a) public worship b) any religious ceremony." Webster's New World Dictionary at 1226 (Prentice Hall 1994). Because "services" are by definition religious in nature, it does not appear that they could ordinarily be understood to serve as a vehicle for both religious and secular viewpoints. I am therefore satisfied--while recognizing that the line between permissible "content" discrimination and impermissible "viewpoint" discrimination "is not a precise one," *Rosenberger*, 115 S. Ct. at 2517--that the District's ban on religious "services" in SOP 5.9 is best described as a form of "content" discrimination that does not favor one viewpoint over another. For this reason, I concur in so much of the majority's opinion as upholds the ban on religious worship.

I note, however, that I am more skeptical than the majority appears to be of the government's ability to draw distinctions between religious worship--or indeed religious instruction--and "other forms of speech from a religious viewpoint that District # 10 has elected to allow . . . ." *Ante*, at 6544. In some circumstances, enforcement of the exclusion of religious "services" might lead to "excessive entanglement with religion," *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). *Cf. Rosenberger*, 115 S. Ct. at 2524; *Board of Educ. v. Mergens*, 496 U.S. 226, 248, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990); *Widmar*, 454 U.S. at 270 n.6. There may be cases in which the parties dispute whether or not a proposed activity for which permission to use school premises is denied actually constitutes religious instruction or worship, and the very act of making such classifications may deeply--and unconstitutionally--entangle public officials in essentially theological determinations. However, this issue does not arise in the instant case, as the parties have stipulated that plaintiff seeks to use a school gymnasium for "religious worship services." Joint Stipulated Facts at 8-9.

III.

In conclusion, while in the circumstances presented I concur in the judgment of the Court upholding the District's ban on religious services, I believe that the ban on religious instruction favors secular over religious viewpoints in violation of the Free Speech Clause of the First Amendment. I therefore respectfully dissent from that part of the judgment upholding the ban on religious instruction.

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS,
Plaintiffs, -against- COMMUNITY SCHOOL DISTRICT No. 10, and
CHARLES WILLIAMS, in his official capacity as President of
the Board of Education for Community School District # 10, Defendants.

95 Civ. 5501 (LAP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

1996 U.S. Dist. LEXIS 18044

December 5, 1996, FILED

DISPOSITION: Plaintiffs' motion for summary judgment denied, and defendants' cross-motion for summary judgment granted.

COUNSEL: For THE BRONX HOUSEHOLD OF FAITH, plaintiff: Joseph P. Infranco, Migliore & Infranco, P.C., Commack, NY. For JACK ROBERTS, plaintiff: Joseph P. Infranco, (See above).

For COMMUNITY SCHOOL DISTRICT NO. 10, defendant: Patricia B Miller, O. Peter Sherwood, New York, NY. For CHAS. CHARLES WILLIAMS, in his official capacity as President of the Board of Education for Community School Board District No. 10, defendant: Patricia B Miller, (See above). For THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, defendant: Patricia B Miller, (See above).

JUDGES: LORETTA A. PRESKA, U.S.D.J.

OPINIONBY: LORETTA A. PRESKA

OPINION: MEMORANDUM AND ORDER

LORETTA A. PRESKA, District Judge:

This action arises from defendants' denial of plaintiffs' request to rent the Merseau Middle School for religious worship. Plaintiffs Bronx Household of Faith, Robert Hall and Jack Roberts allege that Community School District # 10 ("School District") in the Bronx has violated the Free Exercise and Free Speech Clauses of the First Amendment, the Equal Protection Clause, and the Religious Freedom Restoration Act by denying them use of Public School M.S. 206B for religious worship. The parties have cross-moved for summary judgment. For the reasons stated below, plaintiffs' motion is denied, and defendants' cross-motion is granted.

BACKGROUND

Responding to a need for a larger building in which parishioners could convene on Sunday mornings, the evangelical Christian church, Bronx Household of Faith, sought permission to rent M.S. 206B, Anne Cross Merseau Middle School in September of 1994. (P11 Joint Stipulation of Facts ("Stip.")). The School District denied the church permission based on its "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities" ("SOP") and New York Education Law § 414 (McKinney's 1995), both of which prohibit rental of school property for the purpose of religious worship. (Stip. PP 15-16)

The SOP sets out a hierarchy of permitted uses. "The primary

use of school premises must be for Board of Education programs and activities." (SOP5.3) "After Board of Education Programs and activities, preference will be given to use of school premises for community, youth and adult group activities." (SOP5.5) In addition to these uses and uses where admission, donations and the like are collected, Section 5.6 states that school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be nonexclusive and open to the general public.

5.6.3. For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

(Stip. P 6) Specifically, section 5.9 provides:

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

(Stip. P 15) Section 5.8 also restricts commercial use of school premises.

Similarly, New York Education Law § 414 permits use of school facilities for meetings, with the following exception:

such use shall not be permitted if such meeting, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .

(SOP 5.9)

During the 1994-95 school year, the School District permitted a variety of groups to use the school facilities for the enumerated purposes. Although the School District did permit the Grace Lutheran Church to rent the school, the church rented the school not for religious worship but for conducting a program on Black History Month (Stip. P 7), a use entirely consistent with the enumerated purposes in SOP5. The School District has never, in fact, rented the school facilities for the purposes of either religious worship or religious instruction. (Stip. P 18)

After the Bronx Household's second request to rent the space

and have the School District policy changed, pastors Robert Hall, Jack Roberts and the Bronx Household brought suit in the Supreme Court of the State of New York, County of the Bronx, under *42 U.S.C. § 1983.* The School District then removed the case to federal court. Plaintiffs moved, and defendants cross-moved for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the following reasons, plaintiffs' motion is denied and defendants' cross-motion is granted.

DISCUSSION

Under Rule 56(c), "[a] motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2d Cir. 1994); *see* Fed. R. Civ. P. 56(c). *See generally Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the particular litigation if application of the relevant substantive law requires their determination. *Anderson*, 477 U.S. at 248.

"A party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle it to judgment as a matter of law." *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996); *accord Chambers*, 43 F.3d at 36. "In moving for summary judgment against a party who will bear the ultimate burden of proof at

trial," however, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995); *accord Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("The moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The moving party, in other words, does not bear the burden of disproving an essential element of the nonmoving party's claim.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "affidavits, depositions, or other sworn evidence as permitted by Fed. R. Civ. P. 56, setting forth specific facts showing that there exists a genuine issue of material fact." *Rule*, 85 F.3d at 1011; *accord* Fed. R. Civ. P. 56(e); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, the nonmovant must "'come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise.'" *Trans Sport v. Starter Sportswear*, 964 F.2d 186, 188 (2d Cir. 1992) (citation omitted).

"In ruling on a motion for summary judgment, the district court is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment." *Id.; accord Chambers*, 43 F.3d at 36. "The function of the district court in considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried." *Rule*, 85 F.3d at 1011. Accordingly, "assessments of credibility and choices between conflicting versions of the

events are matters for the jury, not for the court on summary judgment." *Id.* Similarly, "any weighing of the evidence is the prerogative of the finder of fact." *Id.* "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers*, 43 F.3d at 37 (emphasis added).

I. Plaintiffs' Free Speech Claim

Plaintiffs challenge the constitutionality of SOP5 on the grounds that SOP5 prohibits them from renting public property, namely the middle school, for religious worship, thereby violating their First Amendment right to free speech. Additionally, plaintiffs challenge the constitutionality of New York Education Law § 414, pursuant to which SOP5 was promulgated, on the same grounds.

The extent to which government may regulate expressive activity on public property depends upon the character of the public property in question. *See Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1984). The Supreme Court has recognized three possible classifications for publicly-owned property and has articulated the extent to which expressive activity may be regulated on each. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985).

With respect to the first category of public property, "traditional public fora," the state's power to regulate expressive activity is most limited. "Traditional public fora" include streets and parks -- those areas that "have immemorially been held in trust for the use of the public . . .

and have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939). Any content-based regulation of a traditional public forum is enforceable only when "necessary to serve a compelling state interest" and must be "narrowly drawn" to serve that purpose. *Perry*, 460 U.S. at 45, 103 S. Ct. at 955.

The second category of public property includes "public property which the state has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 46. A nonpublic forum generally refers to property that is not open for communicative purposes "either by tradition or by designation." *Lamb's Chapel v. Center Moriches Un. Free Sch. Dist.*, 959 F.2d 381 (2d Cir. 1992) (citing *Perry*, 460 U.S. at 46, 103 S. Ct. at 955), *rev'd on other grounds*, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). The government may transform such property into a public forum, however, by designating it for communicative purposes. A public elementary school, for example, although public property, is a nonpublic forum with respect to the general community. *See Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (citing *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, 102 S. Ct. 970, 71 L. Ed. 2d 109 (1981)). The state may transform an elementary school into a traditional forum by opening it to the public, either by policy or practice, for communicative purposes. Although the state is never obligated to open a nonpublic forum, once it does, any regulation is subject to the same scrutiny as that governing a traditional forum. *Fighting Finest, Inc. v. Bratton,* 1996 U.S. App. LEXIS 28748, No. 95-9042, slip op. 7935, 7944-45 (2d Cir. Sept. 9, 1996).

The third category of public property is the designated or "limited public forum." Within this category "property remains

a nonpublic forum as to all unspecified uses and exclusion of uses." *Deeper Life*, 852 F.2d at 679-80 (citations omitted). Any regulation of expressive activity in a nonpublic forum need only be reasonably related to a legitimate government concern. See *International Soc'y For Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *cert. granted*, 502 U.S. 1022, 112 S. Ct. 855 (1992). The regulation "need only be viewpoint neutral to pass constitutional muster." *Cornelius*, 473 U.S. at 802, 105 S. Ct. 948, 956 (1983); *Perry*, 460 U.S. at 47 ("The State may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."). Thus, the state is free to transform a nonpublic forum into a public forum for certain subjects of expression or activity. Once it opens up a nonpublic forum for expression on a particular topic or designated range of topics, however, it may not discriminate based on the viewpoint of any speaker on a permissible topic. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 132 L. Ed. 2d 700, ___ U.S. ___, 115 S. Ct. 2510 (1995) (stating that viewpoint discrimination is impermissible "when directed against speech otherwise within the forum's limitations").

To determine whether the denial of the Bronx Household's request to use the school for religious worship is constitutionally permissible, I must determine, as a threshold matter, which type of forum is involved. Although a grade school is generally considered a nonpublic forum, *see Deeper Life*, 852 F.2d at 679, through SOP5 the School District has transformed the school into either a public forum or a limited public forum. To determine which type of forum has been created, I look not only to New York Education Law § 414 and SOP5 but also to the practices and the intent of the school in creating the forum. *See Fighting Finest, Inc. v. Bratton*, 1996 U.S. App. LEXIS 28748, No. 95-9042, slip op. 7935, 7947

(listing factors determining which forum has been created, including nature of the property, intent, and conditions of access).

The first prong of the inquiry entails an examination of the laws governing this forum. Plaintiff contends that the language of SOP5 is so broad that virtually every topic is permissible except religious worship. Neither SOP5 nor NY Educ. Law § 414, however, designates a public forum excluding solely religious worship. The language of SOP5, which tracks that of § 414, creates a hierarchy of permissible uses that clearly prioritizes use of school premises for Board of Education programs and excludes virtually all exclusive organizations. n1 Section 5.9 prohibits "religious services or religious instruction," and Section 2.11 extends this prohibition to virtually all exclusive groups through the following language:

Such permit shall not be permitted if such meetings are under the exclusive control . . . of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization, other than organizations of veterans and volunteer firemen.

n1 Despite the apparent variety of subject matter for which SOP5 provides access, it is not all-encompassing. At oral argument, plaintiffs' counsel suggested that the SOP's permitting social, civic and other community welfare topics must, by its very breadth, be read to encompass religious worship, and the prohibition on religious worship removed. He noted, inter alia, that churches do more for the welfare of the community than many of the other entities and activities which have been accepted by the School District. Historically and constitutionally in this country, however, religion cannot be lumped with other social, civic and community welfare activities. From our earliest Pilgrim

forefathers, it has been the tradition in this country for government and religion to remain separate. Establishment Clause, U.S. Constitution. Therefore, the assumption that broadly stated purposes such as "civic" and "community" must also encompass "religious" is unfounded.

Such exclusive societies presumably could not serve the community in the same manner that nonexclusive social, civic and cultural groups would. Under New York Education Law § 414, pursuant to which SOP5 was promulgated, "access to the school property is permitted only where it serves the interests of the public in general, rather than that of sectarian groups." *See Deeper Life Christian Fellowship*, 852 F.2d at 680. Therefore, because SOP and New York Education Law § 414 clearly limit access to the school to those purposes enumerated and effectively prohibit use by all exclusive groups, SOP5 and New York Education Law § 414 indicate the creation of a limited public forum and not a public forum.

The next step of our inquiry necessitates a close scrutiny of the practices of the School District in applying the SOP. The facts as to the School District's past practice are not in dispute. Paragraphs seven, eight and ten of the Stipulated Facts list the non-school groups that have met in schools within the School District during the 1994-95 school year. All the meetings, including those held by the Bronx Household and other churches and religious-affiliated groups, were for activities expressly authorized by SOP5. As the parties have stipulated, none of the meetings was for religious worship. (Stip. P 8) Thus, the School District's past practices indicate the creation of a limited public forum.

The last step of the forum analysis requires a careful assessment of the School District's intent in opening access to the school to non-school groups. *See Longo v. U.S. Postal*

Service, 953 F.2d 790 (2d Cir. 1992) ("The government does not create a public forum through unconscious, unspoken practices or by permitting limited discourse but 'only by intentionally opening a nontraditional forum for public discourse.'"). The past practices of the School District are one indicia of its intent. *See Deeper Life Christian Fellowship v. Board of Educ.* 852 F.2d 676 (2d Cir. 1988) (citations omitted) (stating that the intent of the school in creating a forum "is a fact-oriented inquiry, and the past practice of the School Board in regard to its use of the property at issue is a proper consideration in that inquiry"). The School District's past practices reveal no intent to create an open forum. The SOP is the only other indicium of the School District's intent. Because the School District has never deviated from the purposes enunciated in the SOP, it cannot be said to have evinced any intent other than that intent embodied in SOP. Although the SOP establishes relatively broad categories of permissible uses, the restriction contained in SOP5.9 as well as the explicit restrictions contained in section 2 of the SOP n2 indicate an intent to limit access to the forum.

n2 Plaintiffs' counsel conceded at oral argument that this section is "rife with restrictions."

Examining the SOP, New York Education Law § 414, the past practices and the intent of the School District, I find that the School District has created a limited public forum, and not a public forum. Because the School District has created a limited forum, any regulation of that forum need only be reasonably related to a legitimate government concern. *Perry*, 460 U.S. at 47. The language of both SOP5 and New York Education Law § 414 strongly suggests that the restrictions exist to preserve the nonexclusive nature of the property. I find that SOP5 and New York Education Law § 414 constitute reasonable regulations of expression related to the legitimate

government concern of preserving and prioritizing access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities.

II. Plaintiffs' Establishment Clause Claim

Plaintiffs claim that SOP5 and New York Education Law § 414 violate the Establishment Clause of the First Amendment because the denial of access to the school premises inhibits the Bronx Household from practicing its religion. Under the Establishment Clause of the First Amendment to the Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Plaintiffs assert that the government has a "duty to accommodate" religious speech in a public forum and that such accommodation does not violate the Establishment Clause. Because I find that the state has not created a public forum and thus must demonstrate only a legitimate purpose to justify its ban of exclusive groups and has done so, I need not address this argument.

III. Plaintiffs' Equal Protection Claim

Plaintiffs also assert that a content based restriction of free speech in a public forum violates the Equal Protection Clause. Plaintiffs urge me to review SOP5 and Education Law § 414 under a standard of strict scrutiny. Because the plaintiffs' argument is premised on the existence of an open forum, I need not address this contention either.

CONCLUSION

Because I find that SOP and New York Education Law § 414, together with the practices and intent of the School District in question create a limited public forum and not a

public forum, plaintiffs' motion for summary judgment is denied, and defendants' cross-motion for summary judgment is granted.

Dated: New York, New York

December 5, 1996

LORETTA A. PRESKA, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of November, one thousand nine hundred and ninety-seven.

The Bronx Household,

Plaintiff-Appellant,

v. Dkt. No: 96-9633

Comm. School District,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant The Bronx Household.

Upon consideration by the pannel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: (signature)
Beth J. Meador
Administrative Attorney

Date: November 24, 1997

UNITED STATES CONSTITUTION, AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1.... No State shall ...deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK EDUCATION LAW §414

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the

commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be

permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) (Added, L 1991) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

STANDARD OPERATING PROCEDURES: TOPIC 5: REGULATIONS GOVERNING THE EXTENDED USE OF SCHOOL FACILITIES

5.6 In addition to the use described in items 2.11, 5.3 and 5.5, school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education,learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments,and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

5.9 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

STANDARD OPERATING PROCEDURE 7: GUIDELINES GOVERNING FEES FOR THE EXTENDED USE OF SCHOOL BUILDINGS (DURING HOURS SCHOOLS ARE NOT OPEN)

7.1 Fee Schedule Organizations

The Organizations listed below shall be charged the fees as stated in the most current "Fee Schedule," available from the appropriate Permit Office or Office of School Facilities. All other organizations are categorized as cost schedule organizations (see item 7.2).

7.1.1 Local Adult Groups, which include local tenant groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, and local chapters of tax-exempt organizations using the school facilities for non-fund raising purposes;

7.1.2 Local Youth Groups, including scouts, little

leagues, teen clubs, etc.;

7.1.3 Government Organizations, which include federal, state and city organizations and programs (e.g. Parks Department, Police and Fire Departments, Board of Elections, etc.); and

7.1.4 Board of Education related groups or activities.

7.2 Cost Schedule Organizations

The following organizations shall be charged a supplemental fee of at least 10%. However, where two or more organizations request simultaneous use of premises, the applicable fees and space charges may be shared.

7.2.1 Use of school facilities for nonpublic employee recreation;

7.2.2 Unions, professional societies, and similar organizations;

7.2.3 Non-Board of Education-related educational agencies, including private schools and universities; and

7.2.4 Social Service Agencies, which charge a membership, registration, or other fee and use the school facilities in the absence of their own facility. These include local "Y"s, settlement houses, and similar agencies.

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No. 96-1361

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

THE BRONX HOUSEHOLD OF FAITH,
JACK ROBERTS AND ROBERT HALL,

Petitioners,

- v. -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT NO. 10, AND CHARLES WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether a public school district which has opened its school buildings to certain after-hour uses enumerated in State law is constitutionally required to rent its facilities to a church for regularly scheduled religious worship services?

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STATEMENT OF THE CASE

Petitioners Bronx Household of Faith, an evangelic Christian Church, and its pastors, Robert Hall and Jack Roberts (collectively, "the Church") commenced this action seeking declaratory and injunctive relief against respondents Community School District No. 10 (the "Community School District"), the Board of Education of the City of New York (the "Board"), and Charles Williams, President of the Board of Education for the Community School District (collectively, "the District"). The Church alleges that the District denied it the use of Public School M.S. 206B, known as the Anne Cross Mersereau Middle School (the "Mersereau School") for regularly scheduled religious worship services and that this denial was made pursuant to the Board's Standard Operating Procedures and section 414 of the New York State Education Law, upon which those procedures are based. The Church argues that section 414 and the Board's operating procedures, insofar as they prohibit the Church from conducting weekly church worship services on public school property, violate the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.

The Parties

The Community School District has a student population of over 40,000 students attending pre-kindergarten through eighth grade in its 44 public schools located in the Bronx (JA7).[1] The Mersereau School is located in the

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[1] Numbers in parentheses preceded by a "JA" refer to pages in the Joint Appendix submitted to the Court of Appeals. Numbers in parentheses preceded by "App." refer to the Appendix to the Petition for Writ of Certiorari.

Community School District and has students attending grades five through seven and ranging from nine to twelve years of age (JA14). Both the Community School District and its officers are bound to follow the Board's operating procedures.

Petitioner Bronx Household of Faith is an evangelical Christian Church formed in 1971 (JA104). Members of the Church have children attending schools within the confines of the Community School District, including the Mersereau School (JA15-16).

The Dispute

By letter dated September 8, 1994, the Church requested permission to rent the gymnasium of the Mersereau School on "each and every Sunday" from 10:00 a.m. to 1:00 p.m. "for the purpose of conducting church worship services" (JA102). The letter stated that the Church would conduct such activities as "hymns singing, communion, Bible reading, Bible preaching and teaching." Id. During the worship service, the Church would conduct a "collection" to gather contributions to support the Church (JA14). The collection generally would result in the Church receiving an amount in excess of the rental for the school space. Id. By letter dated November 9, 1994, the Church again requested use of the school, stating that its present location had become too crowded (JA103). The District denied the Church's request (JA14).

Statutory and Regulatory Framework

New York Education Law section 414 governs the use of public school facilities by non-school groups during non-school hours. The statute, the relevant provisions of which have been in effect since 1910, sets forth a list of uses which

a local school district may, in its discretion, permit in their facilities during such hours. While not expressly excluded in the statute, religious worship and instruction are not among the enumerated uses.

In compliance with section 414, the Board has promulgated rules which list the permissible uses of school facilities as provided by that section. The Standard Operating Procedures published by the Board include a chapter entitled Extended Use of School Facilities (JA17-37). Topic 5 of that chapter sets forth the "Regulations Governing the Extended Use of School Facilities," which, in large part, track the language of Education Law § 414 in listing the permissible uses of the District's school buildings (JA26-27). The operating procedures also contain a catch-all provision in section 5.6.6, which provides that school premises may be used "for such other purposes as may be authorized by law" (App. 53a). Since section 414 establishes those "purposes [which are] authorized by law" in New York State, this catch-all provision renders the District's operating procedures coextensive with section 414.

Consistent with the interpretation of section 414 given by New York State courts, section 5.9 of the operating procedures states that religious worship services are not an authorized use of school facilities (App. 53a). In accordance with this Court's precedence, that section does permit "the use of school premises by outside organizations . . . for the purpose of discussing religious material or material which contains a religious viewpoint" (App. 53a).

Section 414 and the Board's operating procedures exclude numerous uses in addition to religious worship services. For instance, procedure section 5.6.3 bars "meetings

sponsored by political organizations" without prior approval of the Board of Education and procedure section 5.8 prohibits the use of school premises for most commercial purposes (JA27).

The parties agree that while the Community School District has rented its school facilities to "outside organizations or groups" for purposes identified in section 414 and the Board's operating procedures -- including after school tutoring, adult education classes, cultural awareness lectures and athletic events for children -- the Community School District has never rented public school space to any organization or group for the purpose of conducting religious worship services (App. 35a). The Community School District has rented space to the Church for permissible activities such as athletic events and a banquet (JA13-14). The Community School District has also rented facilities to other churches and religious groups for activities expressly permitted in the operating procedures including, for example, to the Grace Lutheran Church for a program on Black History and to the Greek Orthodox Community Church for the teaching of Greek culture, history and language (JA10-11). The parties agree that the fee charged for the space requested is below market rent (JA13), so that the ability to use the space would represent an economic benefit and subsidy to the Church.

After the denial of the Church's request to rent space in the Mersereau School, the Church brought suit in the Supreme Court of the State of New York under 42 U.S.C. § 1983. After the District removed the case to federal court, the Church moved for summary judgment arguing that its rights had been violated under the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment and the Religious Freedom Restoration Act. The District cross-moved

for summary judgment, arguing that Education 414 and the Board's operating procedures were constitutional.

District Court Decision

In its well-reasoned decision, the District Court rejected the Church's challenge to section 414 and the Board's operating procedures. 1996 U.S. Dist. LEXIS 18044 (reprinted at App. 32a-45a). The District Court correctly held that the Mersereau School was a "limited public forum" which was closed to all unspecified uses and excluded uses (App. 43a). The District Court rejected the Church's argument that a church was just another "social" or "civic" activity permitted under section 414, noting that churches have historically and constitutionally been treated differently from other social, cultural and civic activities (App. 41a, n.1). Examining the past practice of the Community School District, the District Court found that it had consistently applied its rules to exclude activities prohibited by statute and Board operating procedures (App. 43a). The District Court also correctly concluded that the Community School District had demonstrated no intent to create an open forum in the Mersereau School. Id.

Having determined that the Mersereau School was a "limited public forum," the District Court then ruled that the exclusion of religious worship services was "reasonably related to a legitimate government concern" (App. 43a-44a). The Court found that the District had a legitimate interest in "preserving and prioritizing access to the middle school primarily for education purposes and, secondarily, for nonexclusive public and community activities" (App. 44a).

The District Court also rejected the Church's Establishment Clause and Equal Protection claims (App. 44a).

The Court found these claims to be based upon the supposition that the Mersereau School was a public forum. Having rejected this premise in its Free Speech Clause analysis, the District Court denied those other claims as well (App. 44a).

Court of Appeals Decision

Writing in two separate opinions, the Second Circuit unanimously affirmed the judgment of the District Court. 127 F.3d 207 (2d Cir. 1997), rehearing and rehearing en banc denied, _ F.3d _ (2d Cir. Nov. 27, 1997) (reprinted at App. 1a-31a). Both the majority and concurring opinions rejected the Church's argument that the School District's after-school use policy had transformed the Mersereau School into a public forum (App. 9a-14a; 23a-24a). The Second Circuit correctly held that a public school "simply is not a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice" (App. 11a).

Viewing the Mersereau School as limited public forum, the Second Circuit unanimously held that the prohibition of religious worship services was both reasonable and viewpoint neutral (App. 14a-16a; 30a). The Court found reasonable the State's desire to avoid identification of a public middle school with a particular church, especially in the minds of middle school children (App. 14a-15a). The Court also held that it was "not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school" (App. 15a).

The Second Circuit concluded as well that the policy of the State and the School District was viewpoint neutral because the school has never been opened to any group for religious worship services (App. 15a). The Circuit found that there was

a recognizable distinction between religious worship and the discussion of secular matters from a religious viewpoint, and that the blanket exclusion of the former was not discriminatory (App. 16a). The Second Circuit also rejected petitioners' Equal Protection, Free Exercise, Establishment Clause and Religious Freedom Restoration Act claims (App. 17a-20a).

In his concurring opinion, Judge Cabranes agreed with the majority that the exclusion of religious worship services was reasonable and viewpoint neutral (App. 241-30a). Judge Cabranes wrote to express his opinion that the State's exclusion of religious instruction, as opposed to religious worship, was not viewpoint neutral since instruction on other topics was permitted (App. 27a-30a). However, Judge Cabranes did not need to reach this issue because the Church never requested the use of the Mersereau School for religious instruction.

REASONS FOR DENYING THE WRIT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT WAS CORRECT IN HOLDING THAT THE MERSEREAU SCHOOL WAS A LIMITED PUBLIC FORUM, AND THAT THE EXCLUSION OF RELIGIOUS WORSHIP SERVICES FROM THAT FORUM WAS REASONABLE AND VIEWPOINT NEUTRAL.

The writ should be denied because the Court of Appeals correctly applied the teachings of this Court when it held that the Mersereau School was a limited public forum and that the exclusion of religious worship services from that forum was reasonable and viewpoint neutral.

A. The Mersereau School is, at Most, A "Limited Public Forum" Which Has Not Been Opened to Religious Worship Services.

The Church contends that Education Law section 414 and the Board's operating procedures, which implement section 414, violate the Church's First Amendment right to free speech by prohibiting it from leasing a public school building to conduct weekly religious worship services. Where a party claims that its right to free speech on public property has been violated, the first inquiry is whether the public property in question is: (1) a traditional public forum; (2) a designated public forum, either limited or not limited; or (3) a nonpublic forum. International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992).

A "traditional public forum" is "government property that has traditionally been available for public expression" such as parks and streets. Krishna Consciousness, 505 U.S. at 678. Regulations of speech on such property are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." Id.

A "designated public forum," is property that the State has opened for expressive activity by part or all of the public and either for all or certain subject matters. Id. A "designated forum" may be "limited" or "unlimited." Id. Where the designated forum permits unlimited speech for a specific group of people, the forum is treated like a traditional forum, where any restriction must be narrowly drawn to achieve a compelling state interest. Widmar v. Vincent, 454 U.S. 263 (1981). Where the designated forum is "limited," restrictions as to subject matter need only be "reasonable and viewpoint neutral." Rosenberger v. Rector Visitors of University of

Virginia, 515 U.S. 819, 829 (1995) (with a limited designated forum "[t]he State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum' . . . nor may it discriminate against speech on the basis of its viewpoint").

All other public property falls into the category of "nonpublic forum" where a government's regulation of expressive activity "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." Krishna Consciousness, 505 U.S. at 679.

This Court has recognized that a public school is not a traditional public forum. A school district, "like a private owner of property, may legally preserve the property under its control for the use to which it is dedicated." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390 (1993). In Lamb's Chapel, this Court determined that "[c]ontrol over access" to a public school that has not been designated an open forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and viewpoint neutral.'" Id. at 392-93.

To succeed in its First Amendment claim, the Church must establish that New York State's access policy has created a either designated open forum or a limited public forum encompassing religious worship services. Section 414, on its face, does not create an open forum. By enumerating a list of permissible uses, the statute evinces a purpose to exclude all non-listed purposes. As this Court held in Cornelius v. NAACP Defense & Ed. Fund, Inc., 473 U.S. 788, 802 (1985), the "government does not create a public forum by inaction or

by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."

Nor, as the New York State courts have held, does section 414 create a limited public forum open to religious worship services. See Trietley v. Board of Educ., 65 AD2d 1 (4th Dep't 1978). Section 414, first enacted in 1910, sets forth ten categories of uses which are permitted on school property. In addition to religious worship services, numerous other possible uses are not listed in the statute, including political meetings, commercial uses, labor union meetings, and the meetings of fraternal organizations, such as the Elks or Lions.

B. The List of Permissible After-Hour Uses Contained in Education Law Section 414 is not so Broad as to Render All the Public Schools of the State of New York Open Forums Available for Any Use By Any Group Whatsoever.

The Church argues that section 414 renders the public schools of New York State open to all conceivable uses by permitting a broad range of uses under the category of "[s]ocial, civic and recreational" meetings in subdivision (c) of section 414 (Pet. at 13). Yet, however broad this phrase may be, this Court has already recognized that religious organizations are not just another "social" or "civic" group, but rather, may be treated differently and exempted from generally applicable laws. For example, in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), the Court upheld the exemption for religious organizations from Title VII's prohibition against employment discrimination on the basis of religion.

Moreover, as noted above, there are a variety of activities which the Board's operating procedures and section 414 do not permit in school facilities during after-school hours. The existence of impermissible uses is ample evidence of the government's intent to create a limited public forum rather than an open public forum. Cornelius, 473 U.S. at 803.

In urging this Court to declare that by opening the public schools of the State of New York to a wide variety of non-religious uses, section 414 opened the public schools to religious worship services, the Church relies on what it calls an "anvil-like hint" in Lamb's Chapel that section 414 renders all of the public schools of New York State open forums (Pet. at 18-19).

In Lamb's Chapel, this Court wrote (508 U.S. at 391):

> The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora . . . . The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a "close question" . . . as to whether the District had in fact already opened its property for religious uses (footnote omitted).

The Church tellingly omits from its reprinting of this quotation the last portion in which this Court suggests that the argument has force only because the school district in that case may have permitted "religious uses" in the past (Pet. at 19). The Church omits as well the footnote immediately following that passage in which the Court discussed these past religious uses, which included a "New Age religious group known as the 'Mind Center,'" a group of gospel singers and the salvation army youth band. 508 U.S. at 391-92 n.5. The Court noted that the first use, which involved a lecture series by a psychotherapist on topics including parapsychology and metaphysics, with "reference[s] to religious matters" was "particularly interesting and relevant to the issue before us." Id. at 392 n.5. Thus, when read in context, the cited passage gives no hint -- anvil-like or otherwise -- that where a State has opened its schools to a variety of non-religious uses, it must also open its schools to all public uses, including religious worship services.

C. Nor Has The District Created an Open Forum Either Through the Board's Operating Procedures or Through the District's Prior Practices.

The Church also argues that the District has allowed its public schools to become open forums through both the Board's operating procedures and the Community School District's past practices. The District Court and the Second Circuit correctly found that there was no evidence that the District, by its procedures or its practice, intended to create an open forum.

The language of the Board's operating procedures makes it abundantly clear that the State and City had no intention of converting their school facilities into open public

forums. First, the fact that the operating procedures require that users seek permission to use the forum (JA19), is a strong indication that no open forum was created. See Cornelius, 473 U.S. at 803. Second, sections 5.3 and 5.5 of the operating procedures prioritize the use of public school facilities (JA26). The favoring of some subject matters over others could not be contemplated if the government intended an open forum. Without this policy of prioritizing, the District would have core educational activities, such as after-school tutoring, competing on an equal footing for time and space with non-educational activities.

The Church erroneously relies on the fact that the Board's operating procedures permit "such other uses as may be authorized by law" (Pet. at 13). The only natural reading of this provision, however, is that it refers back to section 414, which enumerates all the uses of public school facilities "authorized by law." This provision indicates that the City's operating procedures and the State statute 414 are co-extensive.

The Church further argues that the Community School District created an open forum on the basis of past practice by permitting a wide range of groups to use its facilities (Pet. at 13). But the Church does not suggest that any of the uses permitted by the District was broader than those permitted by either Board's operating procedures or Education Law section 414. Nor does the Church claim that any of the prior uses were similar to religious worship. As noted above, the parties have stipulated that the school district "has never rented school facilities to non-school groups or organizations . . . for the purpose of conducting religious worship services and religious instruction" (App. 7a-8a).

Thus, the Community School District has not by its procedures or past practices intentionally or inadvertently opened its doors to renting its facilities to regularly scheduled religious worship services.

D. The Second Circuit's Decision in this Case is Not in Conflict with Any Prior Decision of this Court or any other Federal Court.

The Church errs when it argues that this Court and five federal Circuit Courts of Appeals "have found that similar policies created public forums" (Pet. at 13). The Church relies primarily on Widmar v. Vincent in which the issue presented was the right of college students to meet for religious worship services on their own university campus. In contrast to the restriction-laden policy at issue here, the university in Widmar had created a truly open forum in which any legitimate student group was permitted to meet. See Chess v. Widmar, 635 F.2d 1310, 1312 (8th Cir. 1980), aff'd sub nom., Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, this Court characterized the University campus in Widmar as a "public forum." 454 U.S. at 270.

The Second Circuit in a prior decision upholding the exclusion of religious worship services in the public schools, Deeper Life Christian Fellowship, Inc. v. Board of Education, 852 F.2d 676, 679 (2d Cir. 1988), correctly distinguished the Widmar decision:

> Widmar, however, does not control the result here. As the Supreme Court pointed out in a later case, in Widmar it had "noted that a university campus, at least as to its students, possesses many of the characteristics of a

> traditional public forum," Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 . . . (1985), thereby subjecting attempts at regulating use of the property to the most exacting constitutional standards as to the forum's intended beneficiaries.

In reliance on footnote 6 in the Widmar decision, the Church also argues that religious worship services must be permitted wherever "religious discussion" is allowed because there is no intelligible way to distinguish between "religious discussion" and "religious worship" (Pet. at 22-25). The problem with this argument is that it would open all limited public forums to religious worship services. Under Lamb's Chapel and Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), a government which has opened a forum to speech on a particular subject-matter from a secular viewpoint, must also open the forum to speech on the same topic from a religious viewpoint. The Church argues that the forum must then be opened to religious worship services as well.

The absurdity of the Church's argument is demonstrated by an example: Once an elementary school invites a speaker to discuss any topic imaginable, for example fire-safety, the school is required, under Lamb's Chapel, also to permit a discussion of fire-safety from a religious viewpoint. Under the Church's faulty syllogism, the school would then also be obligated to permit outside groups to conduct religious worship services on school grounds -- because of the perceived inability to distinguish between a discussion of fire-safety from a religious viewpoint and a religious worship service.

While the Second Circuit's decision may result in school districts and courts having to make difficult distinctions between religious worship services and other forms of religious speech, the special status given to religion and religious organizations by the Constitution and various federal and state laws render such line-drawing inevitable. For example, section 107 of the Tax Code, which exempts the rental value of a parsonage from a "minister of the gospel's" gross income, has required federal courts to examine whether a particular member of the clergy is performing religious worship services. Tanenbaum v. C.I.R., 58 T.C. 1 (1972) (holding that a rabbi employed by the American Jewish Committee was not entitled to the section 107 exemption because he did not perform "any sacerdotal duties or conduct religious worship").[2]

Such line drawing arises in other contexts as well. For example, it is well-recognized that public school students may discuss religious materials from a historical or literary

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[2] One may also note that Congress frequently provides that money earmarked for such purposes as education grants, facilities for the elderly, and child care block grants may not be used for programs involving religious worship or instruction. See, e.g., 20 U.S.C. § 1069c (certain grants to higher education institutions "may not be used . . . for . . . any religious worship or sectarian activity."); 42 U.S.C. § 3027(a)(14)(A)(iv) (requiring states seeking federal aid for construction of centers for the elderly to submit plans providing assurances that "the facilit[ies] will not be used and [are] not intended to be used for sectarian instruction or as . . . . place[s] for religious worship")' 42 U.S.C. § 9858k(a) (no child care or development block grants "shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

perspective, Abington School District v. Schempp, 374 U.S. 203, 300 (1963) (Brennan, J., concurring), or perform religious music, such as a Mozart requiem, at a school concert. Surely, the Church cannot seriously argue that discussions of the religious material and the performance of religious music must be banished from the public schools because of the theoretical difficulty in drawing clear lines between such activities and religious worship services.

In any event, the facts of this case do not remotely approach any difficult boundaries: The Church wishes to use the school on a permanent basis as its house of worship. Absent evidence that the School District discriminated against the Church by permitting worship activities by other religious organizations, or excluded the Church from expressing its views in the context of activities permitted within the limited public forum, the Church's claim must fail.

The Church also asserts -- without elaboration -- that the Second Circuit's decision conflicts with this Court's decisions in Board of Education v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel, and Fowler v. Rhode Island, 345 U.S. 67 (1953) (Pet. at 18). Each of these cases is distinguishable from the present case. In Mergens, this Court upheld the Equal Access Act which mandates that secondary schools which permit non-curriculum-related student groups to meet on school property, not prevent other student group meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." 496 U.S. at 235. This case is distinguishable because the Court did not hold that the Free Speech Clause required school districts to adopt such a policy.

In Fowler, this Court struck down an ordinance which was applied to bar a group of Jehovah's Witnesses from conducting a religious worship service in a public park where other groups had been permitted to conduct religious services in the same location. No such viewpoint discrimination has been alleged here.

And in Lamb's Chapel, this Court held that a school district could not exclude a discussion of a subject matter from a religious viewpoint, if it permitted discussion of the same subject matter from a secular viewpoint. 508 U.S. at 394. As concurring Judge Cabranes found, there is no viewpoint discrimination in this case because there is no secular equivalent of a religious worship service (App. 30a).

The Second Circuit's decision is also not in conflict with the other Circuit Court decisions cited by the Church (Pet. at 15-17). In Gregoire v. Centennial School District, 907 F.2d 1366 (3rd Cir. 1990), cert. denied, 498 U.S. 899 (1990), the Third Circuit struck down a policy excluding religious speech in the evening at public schools because the policy allowed religious speech in the afternoon. 907 F.2d at 1379. Similarly, in Fairfax Covenant Church v. Fairfax County School Board, 17 F.3d 703 (4th Cir. 1994), cert. denied, 511 U.S. 1143 (1994), the Fourth Circuit struck down a policy under which the schools were open to religious groups but charged such groups a higher rental fee. In Grace Bible Fellowship v. Maine School Admin. District No. 5, 941 F.2d 45 (1st Cir. 1991), the First Circuit struck down the practice of excluding, not religious services, but, instead, the use of the public school facilities by religious groups. The actual practice of the District prohibited religious groups from conducting the same activity (in that case, a community dinner) that a secular group would have been allowed to conduct. This, of course,

would have been a clear violation of this Court's teaching in Lamb's Chapel. Finally, in Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989), the Fifth Circuit correctly recognized that the public library's policy governing the use of its auditorium created a limited forum, but incorrectly applied the "compelling state interest" test in striking down the policy at issue. In light of this Court's subsequent decisions in Lamb's Chapel and Rosenberger, holding that such policies should be evaluated under a "reasonableness" test, the Fifth Circuit's decision in Concerned Women can no longer be considered good law.

The Second Circuit's decision is also not in conflict with the district court decisions cited by the Church (Pet. at 17-18). In Wallace v. Washoe County School District, 818 F. Supp. 1346 (D. Nev. 1991), the school district had no well-defined guidelines and had permitted church groups to conduct "instructional" and "missionary" meetings in the past. Id. at 1350. In Country Hills Christian Church v. Unified School District, 560 F. Supp. 1207 (D. Kan. 1983), the school district had permitted other worship services. Id. at 1211. The remaining cases cited, Shumway v. Albany School District No. 1, 826 F. Supp. 1320 (D. Wyo. 1993); Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991); and Verbena United Methodist Church v. Chilton County Board of Education, 765 F. Supp. 704 (M.D. Ala. 1991), are distinguishable because they involved student baccalaureate services for graduating seniors. In addition, in all three cases, the school districts had previously opened their facilities to outside groups for religious functions. Shumway, 826 F. Supp. at 1325 (after request for use was submitted, the board changed its policy to exclude use by religious groups); Randall, 765 F. Supp. at 796 (school board "maintains an 'open forum policy' towards all . . . groups, both religious and non-religious"), Verbena, 765 F.

Supp. at 708 (board had policy of permitting religious functions).

E. The Exclusion of Religious Worship Services from Section 414's Enumeration of Authorized Uses of Public School Facilities is Reasonable and Viewpoint Neutral.

Once it is established that the school is neither a traditional public forum nor "a designated public forum open for indiscriminate public use," the standard to be applied to a subject matter based exclusion is whether "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Lamb's Chapel, 508 U.S. at 392-93. Accord Rosenberger, 515 U.S. at 829.

The exclusion of religious worship services is "reasonable" for the reasons outlined by the Second Circuit in the instant case (App. 14a-15a), and the Church does not argue otherwise. It was reasonable for the State and the school district to seek "to avoid the identification of a middle school with a particular church" and it was reasonable to "consider the effect upon the minds of middle school children of designating their school as a church." (App. 14a-15a). The State was also "reasonable" in limiting the use of school facilities to those programs which served children, education in general, or groups whose programs were aimed to serve the general public. In practice, all of the uses of the schools in this District were related to the core purposes of public schools: the education and social training of children and the education of the public in general (App. 6a-7a).

Finally, as discussed more fully in subpart F below, the desire to keep the schools from becoming "symbolically

link[ed]" with religion in violation of the concerns embodied in the Establishment Clause is also a legitimate policy reason which justifies the exclusion of religious services from public schools. Agostini v. Felton, __ U.S. __, 117 S. Ct. 1997, 2011 (1997).

F. Assuming Arguendo that the Mersereau School is an Open Forum, Compliance with the Establishment Clause is a Compelling State Interest Which Justifies the District's Refusal to Permit the Church to Conduct its Regularly Scheduled Services in that School.

Even if the Community School District is deemed to have created an open public forum, the exclusion of religious worship services is justified by the compelling state interest of compliance with the Establishment Clause. As a plurality of this Court recognized in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (plurality opinion), such an interest would justify a content-based restriction on speech in an open forum. Id. at 762:

> There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.

In Agostini, this Court reaffirmed that the Establishment Clause prohibits a government from "creat[ing] the impression of a 'symbolic union' between church and state." __ U.S. at _; 117 S. Ct. at 2012. The permanent placement of a church in a school building would create more than just the impression of a symbolic union.

The Church seeks to conduct regularly scheduled worship services in a public school on a permanent basis. The natural consequence of the Church's argument here, would also require public schools to rent their facilities for church Sunday schools and even parochial education, if they could limit their use of the school buildings to after-school hours. A church might next ask to post a sign in front of the school identifying the building as the location of the church, if only to assist guests of the church attending a wedding or funeral. A church might also seek to store items related to religious worship on school property. The inevitable result of the acceptance of the Church's argument in this case would be the actual, as well as the symbolic, union of Church and School.

The opening of the public schools to religious worship services would also inevitably result in schools districts favoring some denominations over others. While theoretically, different religious groups could use different schools in a given district, in practice, given the number of religious denominations and given the special needs of some of these groups -- for example, the need to worship in walking distance of their homes -- there is no policy that a school district could adopt that would not discriminate against one group or another.[3]

This Court in Rosenberger suggested that a neutral "first-come, first-served" policy might avoid Establishment Clause problems in a given case, 515 U.S. at 843, but such a policy would not work here. If "first-come first-served" had been adopted three centuries ago, every school in New England

---

[3] See F. Mead, Handbook of Denominations in the United States, (8th ed. 1988) (identifying over 232 major religious denominations in the United States).

would house the town's Congregational Church. Discrimination in favor of established sects and against newcomers -- a core violation of the Establishment Clause -- would be the almost certain outcome of a first-come, first-serve policy.

Indeed, any "neutral" policy that would give churches permanent use of public school facilities for regularly scheduled worship services would necessarily favor established religions, such as those that conduct services on Saturdays and Sundays. Friday sabbath observers would be excluded from the State's largess, based only on the conflict between their religious beliefs and the public school schedule. In addition, established religious groups, because they are already favored with the closing of schools on their major holidays, such as Christmas and Easter would be further favored by the rule urged by the Church in this case. Established religions would be able to celebrate their holidays in subsidized school facilities, while less established religious groups would not.[4]

In Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995), which involved a challenge to the display of a cross by the Ku Klux Klan in an open forum in front of an Ohio courthouse, five Justices took the view, either explicitly or implicitly, that the Establishment Clause forbids a government practice neutral towards religion which would lead to the "realistic danger that the community would think that the [State] was endorsing religion or any particular

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[4] For example, in New York City, the Moslem holidays of Idul-Fitr and Idul-Adha are recognized for traffic regulation purposes, see 11 Rules of the City of New York, title 34, § 4-08, but public school is still conducted on these holidays.

creed." 515 U.S. at 772 (O'Connor, Souter and Breyer JJ., concurring); accord 515 U.S. at 787 (Souter, O'Connor and Breyer, JJ., concurring); 515 U.S. at 799 (Stevens, J., dissenting); 515 U.S. at 817-18 (Ginsburg, J., dissenting). While the four Justice plurality wrote that the "community" in question were only those individuals in the community who were aware of the town's open forum policy with respect to the courthouse square, 515 U.S. at 765 (Scalia, J., plurality decision), this view appears to have been rejected by a majority of the Justices. Instead, one must look to a reasonable observer in the community as a whole. 515 U.S. at 772-73; 515 U.S. at 787.

Following the majority view, one may conclude that a reasonable observer -- i.e., one who may be unaware of a school district's open forum policy -- would view a church's permanent use of a public school facility at a subsidized level of rent, as the school district's endorsement of that denomination, as well as religion and religious worship in general.

These Establishment Clause concerns constitute a compelling state interest in maintaining the exclusion of religious worship services from public school buildings. Thus, even under the most exacting standard of review, the District's exclusion of regularly scheduled religious services does not violate the Church's First Amendment free speech rights.

II. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE FIRST AMENDMENT GUARANTEE OF FREE EXERCISE OF RELIGION.

The Church also argues that the public schools must be opened to religious worship under the Free Exercise Clause of the First Amendment (App. Br. at 46-47). The Church would have this Court hold that any time a government opened public property to speech on any topic, the refusal to also permit religious worship on that public property would constitute a substantial burden on religious exercise.

New York State's decision not to include religious worship among the activities permitted on public school grounds does not place a substantial burden on the exercise of religion. See Braunfeld v. Brown, Commissioner of Police, 366 U.S. 599, 605-06 (1961) (plurality opinion) ("legislation which does not make unlawful the religious practice itself" is at most an indirect burden on the exercise of religion). The Church is free to conduct their religious services anywhere else, and is free to conduct secular activities on public school grounds, as it has already done (JA13). Thus, this case bears no resemblance to those cited by the Church (Pet. at 27) where the exercise of certain practices by religious groups were outlawed in their entirety. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down prohibition of animal sacrifice during religious ceremonies); Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (upholding prohibition on use of peyote during religious ceremonies).

III. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

In reliance upon this Court's decision in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), the Church argues that the Equal Protection Clause of the Fourteenth Amendment prohibits the exclusion of religious worship services from the public schools (Pet. at 28). But Mosley does not, as the Church contends, stand for the proposition that all subject matter-based restrictions violate the Equal Protection Clause (Pet. Br. at 28). In Mosley, the challenged ordinance prohibited picketing on public streets near school buildings. The Court held that under both the Equal Protection Clause and the First Amendment, the public street was a traditional public forum where content-based restrictions had to be justified by a compelling governmental interest. 408 U.S. at 96. Where, as here, the challenge involves a limited public forum, the Mosley analysis has no application.

IV. SECTION 414 OF THE EDUCATION LAW DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The Church also argues here -- although it did not so argue in the appellate court below -- that Section 414 violates the Establishment Clause of the First Amendment (Pet. at 26-27). The Church contends that the State's exclusion of religious worship services demonstrates its hostility towards religion. As in its Free Speech argument, the Church again takes the untenable position that once a public school opens itself to public discussion of any subject matter whatsoever, it must also allow religious worship services.

In evaluating a claim that a statute violates the Establishment Clause, this Court will look, inter alia, to

whether the statute has the purpose or effect of "inhibiting religion." Agostini, __ U.S. at __, 117 S. Ct. at 2010. The Church has neither argued, nor offered proof, that the exclusion of religious worship services from the list of permissible uses of public school buildings was intended to inhibit the practice of religion. Moreover, there is no evidence that this prohibition -- in place since 1910 -- has had or will have an adverse effect on religious practice in the State of New York. As the Second Circuit observed, "it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school." (App. 15a).

For these reasons, Education Law § 414 and the School District's operating procedures do not violate the provisions of either the First or Fourteenth Amendment and, thus, were properly upheld by the Second Circuit.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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March 20, 1998

(3)

Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

No. 97-1361

In The

Supreme Court of the United States

October Term, 1997

THE BRONX HOUSEHOLD OF FAITH,
JACK ROBERTS AND ROBERT HALL,

Petitioners,

v.

THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK,
COMMUNITY SCHOOL DISTRICT NO. 10 and
CHARLES WILLIAMS,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FOCUS ON THE FAMILY, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, LIBERTY COUNSEL, NATIONAL ASSOCIATION OF EVANGELICALS, NEW YORK CITY CHURCH OF CHRIST, PRESBYTERIAN CHURCH (U.S.A.), QUEENS FEDERATION OF CHURCHES, UNION OF AMERICAN HEBREW CONGREGATIONS, AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

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36 pp

Question Presented

Whether government officials, contrary to this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), may deny access to a community group solely because its religious speech includes religious worship and instruction.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The letters of the parties granting their consent to the filing of this brief have been filed with the Clerk. A complete statement of interest for each *amicus curiae* is included in the appendix.[1]

Several of the *amici* are religious organizations that have a longstanding interest in protecting equal access for private religious speakers to public facilities. *Amici* Christian Legal Society, Baptist Joint Committee on Public Affairs, National Association of Evangelicals, General Conference of Seventh-Day Adventists, and Presbyterian Church (U.S.A.) have worked to secure the right of equal access for nearly two decades. Several of the *amici* have member congregations or other religious affiliates in New York, Vermont, and Connecticut, that already have experienced actual harm, or are likely to be harmed in the near future, by the discriminatory policy approved in the decision below.

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[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amicus* Christian Legal Society has applied for a grant from the Alliance Defense Fund to cover its expenses in producing this brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the decision of the *amici* to file the brief or the content of the brief.

SUMMARY OF ARGUMENT

The issue presented, whether government officials may deny access to a community group solely because its religious speech includes religious worship and instruction, is controlled by this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court ruled that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Id.* at 269. This Court specifically rejected the premise of the court below that religious worship and instruction could be segregated from other religious speech for discriminatory exclusion. This Court repudiated the argument that government officials could distinguish religious worship or instruction from other types of religious speech because the distinction: 1) lacks "intelligible content," (*id.* at 269 n.6); 2) is inadministrable by government officials, (*id.* at 269-270 n.6, 271 n.9); 3) creates a risk of excessive entanglement between government officials and religion in determining which religious speech is permissible and which religious speech is impermissible, (*id.* at 272 n.11); and 4) is irrelevant, (*id.* at 270 n.6).

The protection of religious speech, including religious instruction and worship, has been reaffirmed in numerous decisions by this Court before and since *Widmar*. *See, e.g., Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. University of Virginia*, 508 U.S. 819 (1995); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The neutrality required by this Court's free speech decisions protecting equal access for religious speakers to public facilities parallels the neutrality required by this Court's free exercise and establishment clause decisions. The court below affirmed a policy that on its face discriminates against community groups wishing to engage in religious worship or religious instruction, which is a violation of the free exercise clause. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990); *McDaniel v. Paty*, 435 U.S. 618 (1978). As explained in *Widmar*, the attempt to sever religious worship or instruction from other religious speech is itself likely to violate the Establishment Clause by creating an excessive entanglement of government officials with religion. 454 U.S. at 272 n.11. Furthermore, the decision below has created a framework in which discrimination among religions is likely to occur, favoritism that the Establishment Clause particularly prohibits. *See Larson v. Valente*, 456 U.S. 228 (1982). *But see, Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214, 221-223 (S.D.N.Y. 1997), *appeal filed*, No. 97-9235 (2d Cir. filed October 2, 1997) (relying on *Bronx Household* to uphold school district denial of access to religious group despite record evidence that previous uses by other religious groups for worship and instruction had been permitted).

The decision below threatens the religious speech rights of citizens living outside, as well as within, the Second Circuit. A past decision of the Second Circuit was particularly damaging to the equal access right of private religious speakers. *Brandon v. Guilderland Central Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123

(1981). The *Brandon* decision was followed by several other courts of appeals to deny equal access to high school students' religious speech. An Act of Congress, the Equal Access Act, 20 U.S.C. 4071 *et seq.* (1994), and a decision by this Court, *Board of Education v. Mergens*, 496 U.S. 226 (1990), were necessary to repair the damage done to religious speech by the *Brandon* decision. Again, in 1993, this Court unanimously reversed a Second Circuit decision quite similar to the decision below and required that religious speakers be granted access to a school auditorium after school hours for the showing of a religious film series. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *rev'g*, 959 F.2d 381 (2d Cir. 1992).

Amici respectfully request that this Court grant the petition for writ of *certiorari*. *Amici* respectfully suggest that the decision below may meet the criteria for summary reversal. The decision below presents an issue controlled by this Court's authority, *Widmar v. Vincent*, and threatens the stability of the equal access precedents of this Court and lower federal courts that protect religious citizens from discriminatory denial of access to public facilities.

ARGUMENT

I. The Second Circuit decision is directly contrary to the controlling authority of this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

The decision below cannot be reconciled with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981),

in which this Court rejected a state university's attempt to prohibit a student group from meeting solely because the group wished to engage in religious worship or instruction. Numerous decisions by this Court before and after *Widmar* have protected citizens' religious speech, including worship and instruction. Forty years before *Widmar*, the Court held that a government official could not exercise unbridled discretion to determine whether private citizens' speech was religious. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This bedrock principle was also applied in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), when this Court rejected a city ordinance that had been interpreted to allow "religious services" in a park but not "religious addresses." *Widnar* has been the basis of several decisions by this Court and lower federal courts protecting private religious expression, with which the decision below also conflicts.

A. In *Widmar*, the Supreme Court rejected a policy essentially identical to the school district policy in this case and ruled that groups seeking to meet for religious worship and religious instruction may not be discriminatorily denied access.

As in this case, in *Widnar*, public university officials did not deny *all* access to a religious group but *conditioned* access upon the group agreeing not to use the university facilities for "religious worship" or "religious teaching." 454 U.S. at 265, 266 n.3. Indeed, the University had "routinely approved" access to university facilities for the student religious group for a number of years. *Id.* at 266 n.3. The University denied the student religious group

continued access only after the University realized that the group's meetings included religious worship and religious teaching. *Id.* The University concluded that the students' meetings violated its policy "prohibit[ing] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.' " *Id.* at 265.

Like the university officials in *Widmar*, the respondent school district has denied access to school facilities during nonschool hours to a religious community group solely because the group's religious speech would include worship and instruction. While it allows the group to distribute religious literature or discuss religious material at its meetings, the school district policy, Standard Operating Procedure ("SOP") 5.9, prohibits religious services or instruction, stating:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

Pet. app. 53.

In *Widmar*, the Supreme Court held such a policy unconstitutional because it violated "the fundamental principle that a state regulation of speech should be content-neutral." 454 U.S. at 277. *Accord Rosenberger v. University of Virginia*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.")

In *Widmar*, the Supreme Court specifically ruled that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Id.* at 269, *citing Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948). And again recently, this Court reiterated that religious worship is protected by the First Amendment, explaining:

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, or even acts of worship, *Widmar, supra*, at 269, n.6.

Capitol Square Review Board v. Pinette, 515 U.S. 753, 760 (1995).[2]

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[2] Worship exercises by student religious groups on public secondary school property are protected by the Equal Access Act, 20 U.S.C. 4071 *et seq.* (1994). The United States Secretary of Education has advised school superintendents that students' prayer services and worship exercises are protected in public secondary school facilities, as stated in his August 10, 1995, "guidance letter" to the nation's school superintendents:

> *Prayer services and worship exercises covered:* A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Religious Expression in Public Schools, Department of Education, Letter from Secretary Richard Riley (August 10, 1995).

In *Widmar*, this Court rejected the argument that religious worship can be distinguished from other religious speech and discriminatorily excluded from public facilities for four reasons:

1. The distinction lacks "intelligible content." A distinction between "religious worship and instruction" and other religious speech lacks "intelligible content" because, as this Court explained in *Widmar*:

> There is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading' – all apparently forms of 'speech,' despite their religious subject matter – and become unprotected 'worship.'

454 U.S. at 269 n.6 (citation omitted). *See also, Rosenberger*, 515 U.S. at 845.

2. The distinction is inadministrable by government officials. In *Widmar*, this Court concluded that government officials should not be making the inquiries necessary to administer a distinction between religious worship or instruction and other religious speech. Indeed, this Court "doubt[ed] that it would lie within the judicial competence to administer" a distinction between "religious worship" and other "religious speech," (454 U.S. at 269 n.6), and characterized the distinction as "judicially unmanageable," (*id.* at 271 n.9). As this Court explained:

> Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries

> would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Id. at 269 n.6 (citations omitted). *See also, Rosenberger*, 515 U.S. at 845.

Similarly, in *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), this Court rejected a city ordinance that had been interpreted to allow "religious services" in a park but not "religious addresses." This Court characterized government officials' determination that speech was a "sermon" as opposed to an "address" as "merely an indirect way of preferring one religion over another." *Id.* at 70. This Court stated that it was not "in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id.*

In its landmark decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that government officials may not exercise unbridled discretion to determine whether speech is or is not religious. As Justice Souter recently stated, it is hard to "imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than determinations about the religious content of speech. *Lee v. Weisman*, 505 U.S. 577, 616-617 (1992) (Souter, J., concurring). *See also, Employment Division v. Smith*, 494 U.S. 872, 889-890 n.5 (1990) (federal judges should not "regularly balance against the importance of general laws the significance of religious practice"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) ("it is a significant burden on a religious organization to require

it, on pain of substantial liability, to predict which of its activities a secular court will consider religious").

3. The distinction will result in excessive entanglement between government officials and religion. Inquiries by government officials trying to administer a distinction between religious worship and religious speech "would tend inevitably to entangle the State with religion in a manner forbidden by [this Court's] cases." *Widmar*, 454 U.S. at 269-270 n.6. Excessive entanglement would result because government officials "would need to determine which words and activities fall within 'religious worship and religious teaching.' " *Id.* at 272 n.11. The Court suggested such determinations were "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Id.* (quotation marks and citation omitted).

This Court reiterated this principle in *Rosenberger*, when it rejected the university's argument that university officials should determine which student publications were religious and which were not. The Court condemned such decisionmaking as raising "the specter of governmental censorship." 515 U.S. at 844. The Court continued:

> As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 845.

Beyond the "impossible task" of determining which words constitute "religious worship and religious teaching," the Court in *Widmar* recognized that application of such a policy would create "a continuing need to monitor group meetings to ensure compliance with the rule." 454 U.S. at 272 n.11. *See also, Board of Education v. Mergens*, 496 U.S. 226, 248, 253. This continual supervision of religious groups' meetings is itself the quintessential example of unconstitutional excessive entanglement.

Because the school district policy in this case is essentially identical to the university policy struck down in *Widmar*, it creates the same excessive entanglement between school district officials and religion. Ironically, in its overly zealous attempt to avoid an Establishment Clause violation, the court below infringed upon the Establishment Clause by permitting government officials to implement a policy distinguishing between "religious discussions" and "religious services or instruction."

4. The distinction is irrelevant for constitutional purposes. In *Widmar*, this Court stated:

> [There is] no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted.

454 U.S. at 270 n.6 (citation omitted). In a long line of pre-*Widmar* precedent, the Court has held that the First Amendment protects private religious speech for purposes of proselytizing persons of other faiths, or persons

of no particular faith.[3] In *Widmar*, this Court saw no valid reason for distinguishing these numerous precedents in order to give less protection to religious worship and instruction among members of the same faith. In other words, religious worship and instruction among members of the same faith should be *at least* as protected as religious speech (such as religious literature distribution) to persons who do not agree with, and often object to, a particular religious message.

B. The *Widmar* decision is the foundation for numerous decisions by this Court and lower federal courts protecting equal access for private religious expression that also conflict with the decision below.

This Court's decision in *Widmar* rests on numerous earlier decisions requiring neutral treatment of citizens' religious speech. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko*

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[3] See, for example, *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (religious speech in park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Kunz v. New York*, 340 U.S. 290 (1951) (denunciation of religion on public streets); *Saia v. New York*, 334 U.S. 558 (1948) (amplification of religious speech in public park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (religious solicitation); *Tucker v. Texas*, 326 U.S. 517 (1946) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Largent v. Texas*, 318 U.S. 418 (1943) (religious literature distribution); *Jamison v. Texas*, 318 U.S. 413 (1943) (same); *Martin v. Struthers*, 319 U.S. 141 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious solicitation); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (religious literature); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (same).

v. Maryland, 340 U.S. 268 (1951); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *cf., McDaniel v. Paty*, 435 U.S. 618 (1978) (prohibiting discriminatory treatment based on religious profession). And *Widmar* is the bedrock for important subsequent decisions in *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995); and *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995).

This Court's decision in *Widmar* is also the foundation for numerous lower court decisions protecting the right of equal access for private religious expression. As a result, *amici* agree with Petitioners' argument that the decision below directly conflicts with the decisions of other circuits, particularly in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 360 (1996), and *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994). *See also, Grace Bible Fellowship v. Maine School Admin. Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir.), *cert. denied*, 498 U.S. 899 (1990); *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989). Numerous additional federal appellate decisions have relied upon the *Widmar* analysis to protect equal access for private religious expression. *See, e.g., Ceniceros v. Board of Education of San Diego Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997); *Good News/Good Sports Club v. Ladue Sch. Dist.*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993); *Sherman v. Community Sch. Dist.*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied*, 511 U.S. 1110 (1994); *Garnett v.*

Renton Sch. Dist., 987 F.2d 641 (9th Cir.), *cert. denied*, 510 U.S. 819 (1993); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993). *See also, Shumway v. Albany County Sch. Dist.*, 826 F. Supp. 1320 (D. Wyo. 1993); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991); *Youth Opportunities Unlimited v. Bd. of Educ.*, 769 F. Supp. 1346 (W.D. Pa. 1991); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983).

The court below attempted to distinguish this Court's rulings in *Widmar* on two grounds that are contrary to this Court's precedents. The panel deemed *Widmar* "inapposite," claiming that *Widmar* applies only if a forum is an "open forum" and that *Widmar* does not apply to schools below the university level. Pet. App. 11-12.

To the contrary, *Widmar* has been the basis for three other decisions in which this Court required equal access for religious speakers, none involving an "open forum" and two applying *Widmar* to public secondary schools. In *Mergens*, this Court found that the statutorily-defined "limited open forum" in that case was not the same as the forum in *Widmar* but, nevertheless, applied *Widmar* to uphold the constitutionality of the Equal Access Act, 20 U.S.C. 4071 *et seq.* (1994), and its requirement that student religious groups be granted equal access for prayer and Bible study on public secondary school property. *Mergens*, 496 U.S. at 242. In *Lamb's Chapel*, this Court applied *Widmar* to uphold equal access for a community religious group to New York school facilities, even if the school auditorium were assumed to be a nonpublic forum. 508 U.S. at 392. Again, in *Rosenberger*, this Court applied

Widmar to require equal access for a student religious publication to a public university student funding program, treating the program as a "limited public forum." 515 U.S. at 829.

Widmar is the controlling authority for the issue presented by this case: whether government officials may deny access to a community group solely because its religious expression includes religious worship or religious instruction. By refusing to apply *Widmar*, the decision below conflicts with numerous precedents of this Court and lower federal courts.

C. The decision below is directly contrary to this Court's Establishment Clause and Free Exercise Clause decisions requiring government officials to treat religion in a neutral manner.

A policy that facially discriminates against private religious expression violates the core requirement of the Establishment and Free Exercise Clauses that the State treat religion in a neutral manner. As the Court explained in *Mergens*:

> [I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. 'The Establishment Clause does not license government to treat religion and those *who teach or practice it*, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.'

496 U.S. at 248 (plurality opinion) (emphasis added), *quoting McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring in judgment). *See also, Rosenberger*, 515 U.S. at

845-846 (government officials' review of publication for religious content "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").

In determining whether government officials have violated the Free Exercise Clause, the Supreme Court examines the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law that is not neutral toward religion on its face must be justified by a compelling governmental interest narrowly tailored to advance that interest. *See Employment Division v. Smith*, 494 U.S. at 886 n.3; *Lukumi*, 508 U.S. at 531-532. The school district policy fails this minimal requirement of facial neutrality because it explicitly states that community groups wishing to engage in religious services or instruction will be automatically denied access. *See Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 707 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994) (school board policy that discriminatorily charged churches higher rental than other community groups for access to school facilities after school hours violated free exercise rights of church).

Equally important, allowing government officials to determine whether speech is religious provides fertile ground for discrimination among religions, which the Establishment Clause prohibits. *See Larson v. Valente*, 456 U.S. 228 (1982); *Fowler v. Rhode Island*, 345 U.S. at 70 (distinguishing between religious "sermon" and "address" is "merely an indirect way of preferring one religion over another"). Relying on the decision below, a federal judge recently upheld a school district's denial of

access to a church despite the record evidence that the school district previously had allowed two other churches access for religious worship and instruction. *Full Gospel Tabernacle v. Community Sch. Dist. 27*, 979 F. Supp. 214, 221-223 (S.D.N.Y. 1997), *appeal filed*, No. 97-9235 (2d Cir. filed October 2, 1997).

Finally, as discussed *supra* at pp. 10-11, in *Widmar*, this Court noted that a policy prohibiting religious worship and instruction was likely to create excessive entanglement between government officials and religion, an additional violation of the Establishment Clause. 454 U.S. at 272 n.11. *See Mergens*, 494 U.S. at 248, 253; *Rosenberger*, 515 U.S. at 844-845.

II. Past Second Circuit decisions denying equal access for private religious speakers have had a negative national impact on religious citizens' free speech rights.

The decision below must be placed in context in order to understand the threat it poses to the free speech rights of citizens living outside, as well as within, the Second Circuit. A previous Second Circuit decision was singularly damaging to equal access for private religious expression. *Brandon v. Guilderland Central Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). In *Brandon*, the Second Circuit ruled that a school district would violate the Establishment Clause if it permitted a student religious group to meet for prayer and Bible study in an empty classroom before school began. *Id.* at 979. Distinguishing "prayer" from "discussions about religious matters," the Second Circuit ruled that "the

protections of political and religious speech are inapposite" for students meeting for prayer. *Id.* at 980 (citations omitted).

Fueling a decade of equal access litigation, the *Brandon* decision was followed by other courts of appeals to deny equal access for high school students engaging in religious speech, including prayer and worship. *See Garnett v. Renton Sch. Dist.*, 865 F.2d 1121 (9th Cir. 1989) (relying on *Brandon* to hold Equal Access Act unconstitutional), *vacated*, 496 U.S. 914 (1990), *on remand*, 987 F.2d 641 (9th Cir.) (relying on *Mergens*, Equal Access Act requires equal access for high school student religious group), *cert. denied*, 510 U.S. 819 (1993); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 551-557 (3d Cir. 1984) (citing *Brandon*, Establishment Clause trumps free speech right of high school student group to meet for religious speech, including prayer and Bible study), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1045-1046 (5th Cir. 1982) (relying on *Brandon* to rule that school district policy allowing equal access for religious student groups would violate the Establishment Clause), *cert. denied*, 459 U.S. 1155-1156 (1983).

Ultimately, an Act of Congress, the Equal Access Act, 20 U.S.C. 4071 *et seq.* (1994), and a decision by this Court, *Board of Education v. Mergens*, 496 U.S. 226 (1990), were necessary to repair the damage done to religious speech by the *Brandon* decision. *Mergens*, 496 U.S. at 239 (Equal Access Act "enacted in part in response to" *Brandon*), *citing* S. Rep. No. 98-357 at 6-9, 11-14 (1984) (describing damage done across the country by the *Brandon* decision).

Again, in 1993, this Court unanimously reversed the Second Circuit in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), to uphold the right of access to a public school auditorium during non-school hours for a church to show a film series with religious content. Because this Court reviewed and reversed the Second Circuit decision quickly, the damage done by *Lamb's Chapel* was contained. *See, e.g., Good News/ Good Sports Club v. Ladue Sch. Dist.*, 859 F. Supp. 1239 (E.D. Mo. 1993) (citing Second Circuit decision in *Lamb's Chapel*, court denied access to religious community group for after-school use on same basis as another community group), *rev'd*, 28 F.3d 1501 (8th Cir. 1994) (relying on Supreme Court decision in *Lamb's Chapel*, court required access for religious community group to school facilities after-school on same basis as another community group), *cert. denied*, 515 U.S. 1173 (1995).

If allowed to stand, the decision below will have negative repercussions for private religious expression across the country. Already the decision below is harming religious citizens' free speech rights within the Second Circuit. *See Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214, 221-223 (S.D.N.Y. 1997), *appeal filed*, No. 97-9235 (2d Cir. filed Oct. 2, 1997). The decision below creates a framework within which school officials will be allowed to pick and choose which religious groups will be allowed access and which will be denied, an outcome that is a stark violation of the neutrality required by the First Amendment. *See Larson v. Valente*, 456 U.S. 228 (1982); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

The decision below is directly contrary to this Court's decision in *Widmar*. The decision below is entirely inconsistent with long lines of this Court's precedent under the Free Speech, Free Exercise and Establishment Clauses, requiring government officials to treat religious citizens in a neutral manner. The decision below threatens the stability and correct application of a long line of precedent of this Court and lower federal courts that have upheld the right of equal access for private religious expression.

CONCLUSION

Amici respectfully suggest that this case is one of the exceptional cases in which it would be appropriate for the Court to grant the petition for writ of *certiorari* and summarily reverse the ruling of the court below. In the alternative, *amici* urge this Court to grant the petition for writ of *certiorari* for full argument before this Court.

Respectfully submitted,

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March 23, 1998

APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the **Christian Legal Society** ("CLS"), through the **Center for Law and Religious Freedom** (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but

only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Baptist Joint Committee on Public Affairs** is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensure the religious liberty of all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptists Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptist through various state conventions and churches.

Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The **Council of Churches of The City of New York, Inc.**, is an ecumenical organization representing the several Protestant and Orthodox denominations and borough church councils having ministry in the City of New York. The Council was known as the Protestant Council of the City of New York before 1968. It is governed by a Board of Directors which is comprised of the bishop or equivalent officer of each diocese, association, synod, presbytery, conference, district or similar regional body of its member denominations and of the president and executive officer of the local councils of churches serving each of the boroughs of the City of New York. The leadership of the Council believes firmly that all citizens are entitled to share equitably in the use of public facilities for peaceable assembly and finds that the Board of Education policy at the heart of the instant case targeting religious speech uniquely for prohibition to be blatant bigotry and an unacceptable demonstration of religious intolerance.

The **Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. **The Ethics and Religious Liberty Commission** is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. *Amicus* produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. *Amicus* also seeks to

bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. *Amicus* frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

Focus on the Family is a California religious nonprofit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week and represents Americans numbering in the hundreds of thousands.

The **General Conference of Seventh-day Adventists** is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than nine million members worldwide. The North American Division of the General Conference administers the work of the church in the United States with nearly 800,000 members.

The Seventh-day Adventist Church strongly supports the twin concepts of free exercise of religion and the separation of church and state and actively promotes those ideals through its bi-monthly *Liberty* magazine. The Working Policy in North America points out "that religious liberty is best achieved, guaranteed and preserved

when church and government respect each other's proper areas of activity and concern" and that "in matters where secular and religious interests overlap, government, in the best interests of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights."

Liberty Counsel is a nonprofit religious civil liberties education and legal defense organization dedicated to preserve religious freedom. Established in 1989, Liberty Counsel's charter is to provide information on First Amendment religious rights, and pro bono legal defense to defend those rights. Liberty Counsel's efforts reach nationwide to protect our religious civil liberties. Liberty Counsel defends the rights of all citizens and organizations to equal access to public facilities for peaceful meetings, conferences, and assemblies.

The National Association of Evangelicals is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **New York City Church of Christ** ("NYC Church of Christ") is a Christian church of almost 5,000 members, with 20 congregations that meet separately in all five boroughs of New York City at least once a week, for worship and other purposes. As a relatively new and growing church, NYC Church of Christ owns no real

property and depends on the availability of reasonably priced rental facilities for holding all of its meetings, including religious services and instruction. The Church has been denied access to New York City school properties for religious services because of the Board of Education's policy prohibiting such use, but has been permitted to rent City school facilities for purposes other than religious services.

The NYC Church of Christ also is interested in the outcome of this case because of (1) its affiliation with ACES World Sector, an association of churches which includes congregations in Albany, Syracuse, Buffalo, and South Connecticut which are likely to be harmed by the discriminatory policy approved by the decision below, and (2) its affiliation with the International Churches of Christ, which have numerous churches throughout the country that rent facilities and are likely to be harmed if the decision below becomes precedent for other circuits.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the **Presbyterian Church (U.S.A.)**. The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final

point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Presbyterians have long supported the separation of Church and State. It was Presbyterians that sought this separation at the founding of this Nation. However in its 1988 policy statement, *God Alone is Lord of the Conscience,* the 200th General Assembly adopted a policy that said: "Religious speech and assembly by private citizens and organizations, initiated by them, is protected both by the Free Exercise of Religion and Free Speech clauses of the Constitution and cannot be excluded from public places." The State Clerk urges this Court to accept jurisdiction over this very important matter.

The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 290 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation of Churches and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty, believing that governmental hostility to and discrimination against religious speech and religious worship, as in the present case, are egregious offenses against citizens which can only breed more destructive intolerance.

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has participated as *amicus* in a wide array of religious liberty cases, often before the United States Supreme Court. Recent Supreme Court *amicus* participation includes *Board of Education of the Kiryas Joel Village School District v. Louis Grumet* (1993) and *City of Boerne, Texas v. P.F. Flores, Archbishop* (1997).

The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is a non-profit synagogue organization for over 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the mainstream Orthodox Jewish community. The U.O.J.C.A. has filed briefs in federal and state courts throughout the nation in cases that affect the interests of the Jewish community and American society at large.

The U.O.J.C.A. has been particularly active and interested in cases that center upon the role of religion in our society and the interpretation and application of the Establishment and Free Exercise clauses in that regard. It has been the consistent position of the U.O.J.C.A. that the Establishment Clause does not require government to disfavor religion in any way. Thus, the U.O.J.C.A. joins in this brief for it believes that the court below erred in its interpretation of what the Establishment Clause requires.

Supreme Court, U.S.
FILED
MAR 31 1998
CLERK

(4)

No. 97-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE BRONX HOUSEHOLD OF FAITH, JACK ROBERTS AND ROBERT HALL,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT NO. 10 AND CHARLES WILLIAMS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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I.

THIS COURT SHOULD GRANT REVIEW AND REVERSE THE SECOND CIRCUIT'S REPEATED AND ERRONEOUS INTERPRETATION OF THIS COURT'S EQUAL ACCESS DECISIONS

A. The Second Circuit Permits School Districts to Exclude Religious Worship and Instruction in Conflict with This Court's Equal Access Decisions.

In its Brief in Opposition, the Board of Education of the City of New York ("School District") fully embraces the doctrinal errors of the Second Circuit in interpreting this Court's equal access doctrine as spelled out in *Widmar v. Vincent,* 454 U.S. 263 (1981) and its progeny. The School District insists that the Constitution permits it to open its school buildings on weekends and week nights to a wide variety of community groups, but also to exclude religious services and instruction. This is a fundamental violation of the First Amendment which the Second Circuit has now upheld four times, including this case. *See Deeper Life Christian Fellowship v. Board of Education,* 852 F.2d 676, 680 (2d Cir. 1988); *Travis v. Owego-Apalachin School District,* 92 F.2d 688, 692 (2d Cir. 1991) and *Lamb's Chapel v. Center Moriches Union Free School District,* 959 F.2d 381, 387 (2d Cir. 1992).

The Second Circuit has openly refused to conform its case law to conform with this Court's decisions. This Court should grant review and reverse the Second Circuit's faulty First Amendment analysis.

The policy in this case reads almost exactly like the one this Court declared to be a public forum for student speech in *Widmar.* The policy at issue in *Widmar* permitted meetings for

"political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980).

The School District's policy in this case, based on N.Y. Education Law §414, allows nonschool groups to meet for "social, civic and recreational" purposes, and "for such other uses as may be authorized by law." Policy 5.6.2 and 5.6.6; Cert. Pet. App. 52a. The School District permits meetings by tenants groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, local chapters of tax-exempt organizations, youth groups, scouts, Little League, teen clubs, labor unions, professional societies and private social service agencies, such as the local "Y"s and settlement houses. Policy 7.1 and 7.2; Cert. Pet. App. 53a-54a.

This Court has ruled that a forum generally open to the public is a public forum, not a limited forum:

> The Constitution forbids a State to enforce certain exclusions from a forum **generally open to the public** even if it were not required to create the forum in the first place.

Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983) (emphasis added). The School District must justify any exclusion from its forum by the compelling state interest standard. "'Where the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification....," *Widmar*, 454 U.S. at 268.

At least five other federal appeals courts have consistently applied these standards to rule that forums opened generally for civic, cultural, recreational purposes (or similarly-worded policies) create public forums, and that exclusions of religious expression from those forums violate the First Amendment. *See*

Grace Bible Fellowship v. Maine School Administrative District No. 5, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School District*, 907 F.2d 1366 (3rd Cir. 1990); *Fairfax Covenant Church v. Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994); *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989) and *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980). The School District attempts to distinguish these cases by pointing to superficial differences between them and this case, but the School District avoids the main point why the Church calls attention to them: All five directly conflict with the Second Circuit's opinion here because they all applied *Widmar* to mean that a forum opened by policies very similar to the one in this case create public forums. Those courts also found that the exclusions of religious expression from those forums were unconstitutional.

In contrast, the School District argues that it has created only a "limited forum." The School District misstates this Court's equal access doctrine -- "[b]y enumerating a list of permissible uses, the statute evinces a purpose to exclude all non-listed purposes." Brief in Opposition at 9. There is no Supreme Court decision which has ever stated such a principle of law, and no other court of appeals has ruled that way. Under the School District's circular reasoning, its forum is limited because it restricts religious services and instruction. But this Court has ruled that a forum is defined by what it includes, not what it excludes. If the forum is opened generally to community groups for expressive activities, then any exclusions are judged by the compelling state interest test. A forum is limited if it is restricted for "use by certain groups," *Perry*, 460 U.S. at 55, n.7; or limited to "the discussion of certain subjects," *id.*

The Fifth Circuit, following this Court's lead, has refuted

the School District's defective argument that any exclusion converts a forum into a limited forum:

> Government property, however, does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction of speech. **The Supreme Court has not adopted such circular reasoning.** (Citations omitted).

Hays County Guardian v. Supple, 969 F.2d 111, 117 (5th Cir.1992) (emphasis added).

This Court should grant review and correct the Second Circuit's repeated erroneous interpretations of this Court's equal access decisions.

B. This Court Strongly Indicated in *Lamb's Chapel* That New York Law Created a Public Forum in New York's Public Schools, Which Conflicts with the Second Circuit's Repeated Rulings to the Contrary.

Bronx Household of Faith ("the Church") repeats that this Court dropped an "anvil-like hint" in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993) that New York Education Law §414 creates a public forum in the New York public schools and that the Second Circuit erred by ruling that the state law created only a limited forum with a permissible exclusion of religious worship and instruction.

The School District said that the Church is wrong because it selectively quoted from this Court's decision in *Lamb's Chapel*. Therefore, the Church quotes the relevant passage in its entirety to show that the Church has accurately relayed the Supreme Court's disagreement with the Second Circuit's repeated rulings on the public forum issue:

> The Church argued below that, because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks. Hence, its view was that subject matter or speaker exclusions on District property were required to be justified by a compelling state interest, and to be narrowly drawn to achieve that end. *See Perry, supra*, at 45; *Cornelius, supra*, at 800. Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. **The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations**, including some that presented a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses. 959 F.2d, at 387.[fn5] We need not rule on this issue, however, for even if the courts below were correct in this respect and we shall assume for present purposes that they

were, the judgment below must be reversed.

Lamb's Chapel, 508 U.S. at 391-92 (emphasis added).

This Court stated that the argument with "considerable force" is the one stating that "the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks."

This Court did not say in *Lamb's Chapel*, as the School District argues, that the issue of prior religious use of the school was the argument having "considerable force." This passage from *Lamb's Chapel* clearly mentions the "prior religious use" argument only in passing and found that the Second Circuit had possibly ruled incorrectly on that point. The School District misreads this portion of *Lamb's Chapel* to avoid this Court's skepticism about the validity of the Second Circuit's "limited forum" reasoning.

This Court should grant review in this case and state straight out what it implied in *Lamb's Chapel* that the Second Circuit has erred in its earlier rulings; that New York Education Law §414 creates an open forum at the public school buildings during nonschool hours; and that the exclusion of religious services and instruction from the forum is an unconstitutional content-based exclusion that violates the First Amendment.

C. The School District's Policy Excludes Religious Services and Instruction, and Permits Almost All Other Expressive Activities.

The School District erroneously criticizes the Church's statement that the policy excludes religious services and

instruction, and little else. The School District wrongly claims that the policy also prohibits "other possible uses ... not listed in the statute, including political meetings, commercial uses, labor union meetings and the meetings of fraternal organizations, such as the Elks or Lions." Brief in Opposition at 10.

This is incorrect. New York Education Law §414 permits political meetings if they are authorized by the school board. Cert. Pet. App. 49a-50a. The state law also permits meetings by fraternal organizations, such as the Elks or Lions, and only prohibits them from charging admission if the proceeds flow directly to the fraternal organization. Cert. Pet. App. 49a. Labor unions may meet in the forum under the School District's forum. Policy 7.2.2; Cert. Pet. App. 54a. As for the ban on commercial activity, neither the state law nor the School District's policy mentions it, let alone defines it. Whether this alleged prohibition excludes nonexpressive commercial activity or protected commercial speech is unclear. Therefore, in practice, the School District's policy excludes religious services and instruction, but little else from its forum. Because the School District permits such a wide array of groups to meet in its schools, it has created an open forum. The content-based exclusion of religious services and instruction must be judged by the compelling state interest test. *Widmar*, 454 U.S. at 270.

This Court should grant review in this case and reverse the Second Circuit's incorrect interpretation of the First Amendment that government creates a "limited forum" if it restricts one kind of speech, no matter how many other forms of speech and viewpoints it permits in the forum.

II.

THE CHURCH SEEKS EQUAL ACCESS TO THE SCHOOL FACILITIES, NOT TO ESTABLISH A "PERMANENT" PRESENCE IN THE SCHOOL

The School District erroneously states that the Church seeks to locate permanently in the public school building. The record flatly contradicts that assertion. The Bronx Household of Faith purchased a piece of land on July 7, 1994 in the neighborhood to construct a church building sometime in the future. Second Circuit Appendix A-108, ¶5. The Church now meets in a crowded house, which it has been doing since 1971. Second Circuit Appendix A-107 and A-108. The Church needs some transition time in a larger facility in order to increase its membership so that the Church will have the financial resources to construct a building on the land it bought. *Id.* The Church has no desire to remain permanently in a school building. Remaining in a school gives the appearance that the Church is transitory and not a settled member of the community. *Id.* A school building is not a long term solution to the Church's building needs because it cannot store equipment at the school, decorate it, etc. *Id.* This is not a case of a religious body locating permanently in a government building.

Importantly, the School District's policy permits "permanent" location by any group in its school buildings. The Church seeks the same access to the buildings that the School District permits for secular community groups. Under the School District's policy, community groups can arrange for meetings, even weekly meetings for one year at a time. Second Circuit Appendix A-20. The organization must seek renewed permission every year. *Id.* The Church desires to have access to the public schools on the same conditions as everyone else. The Church is no more "permanently located" in the public

school than are the Boy Scouts, the Crotona Coalition or any other organization that meets weekly at the schools.

The School District also raises the red herring that if the Church gains access to the school building, it will inevitably demand to post a sign at the school or store equipment in the building. Brief in Opposition at 22. But the policy now does not give any community group the right to do those things. The Church could not demand a right to do something not authorized under the policy. If the policy is changed in the future to allow all groups to post signs outside the schools announcing their meetings, or to store equipment at the schools, the First Amendment would require that religious groups receive equal treatment. There is no "creeping threat" from a religious specter here.

This Court should grant review in order to clarify that giving religious organizations equal access to government-controlled meeting facilities open to meetings by all other groups, does not violate the Establishment Clause.

III.

THIS COURT SHOULD REAFFIRM THAT THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY A POLICY BANNING RELIGIOUS SERVICES AND INSTRUCTION FROM A FORUM GENERALLY OPEN FOR MEETINGS BY COMMUNITY GROUPS

This Court should grant review and restate that the Establishment Clause does not justify a policy singling out religious services and instruction for exclusion from a forum generally open to all community groups. This has been the clear holding of this Court in *Widmar* and related cases, such

as *Lamb's Chapel, Board of Education v. Mergens,* 496 U.S. 226 (1990) and *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819 (1995), among others.

The School District claims that the Church never raised the argument at the Second Circuit that the policy violates the Establishment Clause. Brief in Opposition at 26. This is incorrect. On pages 38-40 of its opening brief to the Second Circuit, the Church argued extensively that the policy violates the Establishment Clause, as it has in the cert petition.

The School District's policy also results in excessive entanglement with religion in violation of the three-prong Establishment Clause test announced in *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971). School officials must unconstitutionally evaluate whether the meeting includes prohibited religious worship or instruction, or accepted religious discussion.

CONCLUSION

For the reasons expressed above, petitioners respectfully ask this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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March 30, 1998